

Nos. 91-543; 91-558; 91-563

IN THE

# Supreme Court of the United States

**October Term, 1991**

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF  
CORTLAND,

*Petitioners,*

*against*

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN  
SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED  
STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as  
Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney  
General,

*Respondents,*

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH  
CAROLINA,

*Intervenors-Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

## JOINT APPENDIX

ROBERT ABRAMS

JERRY BOONE

PETER H. SCHIFF\*

JOHN MCCONNELL

The Capitol

Albany, New York 12224

(518) 473-0330

*Counsel for Petitioner State of New York*

KENNETH W. STARR

*Solicitor General*

Department of Justice

Washington, D.C. 20530

(202) 514-2767

*Counsel for Federal Respondents*

(Names of Attorneys continued on inside of cover.)

*\*Counsel of Record*

**PETITIONS FOR CERTIORARI FILED SEPTEMBER 30  
AND OCTOBER 3, 1991  
CERTIORARI GRANTED JANUARY 10, 1992**

PATRICK N. SNYDER  
*and*  
MICHAEL B. GERRARD\*  
DEBORAH GOLDBERG  
BERLE, KASS & CASE  
45 Rockefeller Plaza  
New York, New York 10111  
(212) 765-1800  
*Counsel for Petitioner*  
*County of Cortland*

JAMES T. SIKARAS  
*and*  
EDWARD F. PREMO, II\*  
PAUL D. SYLVESTRI  
HARTER, SECREST & EMERY  
700 Midtown Tower  
Rochester, New York 14604  
(716) 232-6500  
*Counsel for Petitioner*  
*County of Allegany*

KENNETH O. EIKENBERRY  
FRANKIE SUE DEL PAPA  
ALLEN T. MILLER, JR.\*  
4407 Woodview Drive, 4th Floor  
P. O. Box 40117  
Olympia, Washington 98504-0117  
(206) 459-6157  
*Counsel for Intervenors-Respondents*  
*States of Washington and Nevada*

T. TRAVIS MEDLOCK  
JAMES P. HUDSON\*  
P. O. Box 11549  
Columbia, South Carolina 29211  
(803) 734-3680  
*Counsel for Intervenor-Respondent*  
*State of South Carolina*

*\*Counsel of Record*

## Table of Contents.

	Page
Docket Entries .....	2a
Complaint (dated 2/12/90) .....	13a
Affidavit of Delores Cross in Opposition to Motion to Dismiss Complaint (dated 9/5/90) .....	27a
Exhibit A—Resolution No. 45-89 .....	34a
Exhibit B—Resolution No. 63-90 .....	38a
Exhibit C—Newspaper Article .....	42a
Affidavit of Cindy M. Monaco in Opposition to Motion to Dismiss Complaint (dated 9/5/90) .....	46a
Exhibit A—Letter .....	70a
Exhibit B—Newspaper Article .....	72a
Exhibit C—Newspaper Article .....	74a
Exhibit D—Newspaper Article .....	76a
Affidavit of Clarence D. Rappleyea, Jr. in Opposition to Motion to Dismiss Complaint (dated 9/5/90) ...	79a
United States Exhibits (included in the Compilation of Declarations and Exhibits filed on October 26, 1990) .....	84a
Exhibit A—Declaration of Stephen N. Solomon (dated 10/25/90) .....	84a

Exhibit B—Declaration of Richard L. Bangart (dated 10/25/90) .....	90a
Exhibit E—New York Power Authority Annual Report for 1989 (Exhibit only includes the cover and pages 25-27 of the report) .....	96a
Exhibit J—Low-Level Waste: A Program for Action, Final Report of the National Governors' Association Task Force on Low-Level Radioac- tive Waste Disposal (November, 1980) (excerpts)	105a
Affidavit of Booth Gardner (dated 10/26/90) .....	142a
Affidavit of Carroll A. Campbell, Jr. (dated 10/24/90) ..	147a
Affidavit of Robert J. Miller (dated 11/1/90) .....	152a



1a

Nos. 91-543; 91-558; 91-563

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OCTOBER TERM, 1991.

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THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY;  
and THE COUNTY OF CORTLAND,

*Petitioners,*

*against*

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as  
Secretary of Energy; IVAN SELIN, as Chairman of the United  
States Nuclear Regulatory Commission; THE UNITED  
STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL  
JAMES B. BUSEY, IV, as Acting Secretary of Transportation;  
and WILLIAM P. BARR, as United States Attorney General,

*Respondents,*

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and  
THE STATE OF SOUTH CAROLINA,

*Intervenors-Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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**Docket Entries.**

1990

- |        |    |  |
|--------|----|--|
| Feb 12 | 1  | Complaint, issued summons & returned to atty f/service   |
| Mar 1  | 2  | Original Summons & Affidavit of Svce of Summ/Complaint upon listed Defts, by mail on 2/14/90                     |
| Mar 16 | 3  | FEDERAL Defts notice of appearance   |
| Apr 25 | 4  | DEFTS Letter stating parties have agreed to a 30 day extension of time for Defts to respond to Pltfs complaint   |
| May 23 | 5  | STIP/ORDER 5/23/90 (CGC) Defts time to Answer is extended to 6/8/90  |
| Jun 8  | 6  | Proposed Intervenor's (Movants) Notice of Motion for Leave to Intervene, returnable 7/6/90; Supporting Affidavit |
| Jun 8  | 7  | Proposed Intervenor's Memo of Law  |
| Jun 14 | 8  | Proposed Intervenor's (Movants) Letter to Clerk confirming adjournment of their motion from 7/6/90 to 7/20/90    |
| Jun 11 | 9  | DEFTS Notice of Federal Defts' Motion to Dismiss returnable 8/17/90  |
| Jun 11 | 10 | DEFTS Motion to Dismiss  |
| Jun 11 | 11 | DECLARATION of Louise Milkman in support of defts' motion to dismiss   |
| Jun 11 | 12 | DEFTS Memorandum of Law  |
| Jul 6  | 13 | AFFIDAVIT of Cindy M. Monaco in opposition to motion to intervene  |
| Jul 6  | 14 | PLTF Cortland County's Memo of Law in Opposition to Motion for Leave to Intervene                                |
| Jul 9  | 15 | PLTFS Answering Affidavit in Opposition to Intervention  |
| Jul 9  | 16 | PLTFS Memorandum of Law in Opposition to Motion for Leave to Intervene   |

- Jul 9        17    PLTFS Certificate of Svce of Motion Opposing papers upon Counsel on 7/6/90
- Jul 3        18    DEFTS Notice to Court stating No Opposition to motion for leave to Intervene by Movants and to notify Court of an error of citation in the Defts' Memo is Support of motion to Dismiss, filed on 6/8/90: on page 3, line 17 of that brief, the citation to 10 CFR part 24 (re: incineration) should be to 10 CFR Section 20.305
- Jul 20            MOTION: by Proposed Intervenor for Leave to Intervene = DENIED; Intervenor allowed to proceed *amicus curiae* status, and file a brief
- Jul 23        19    LETTER from AAG Berens adjourning motion from 8/17/90 to 10/5/90 State will submit opposing motion papers by 9/7/90
- Jul 23        20    ORDER 7/20/90 (CGC) Movants' motion for leave to intervene is DENIED, except that (1) it is GRANTED to the extent of granting leave to movants to submit a single memo of law on the motion to dismiss and (2) granted to the extent of granting leave to movants to submit a single memo of law on pltfs motion for summary judgment
- Aug 17            MOTION: Adj. to 10/5/90
- Aug 30        21    Proposed Intervenor (Movants) Notice of Motion for Leave to Intervene, returnable 9/21/90
- Aug 30        22    Movants Supporting Affidavit by Christine Gregoire
- Aug 30        23    Movants Supporting Affidavit by Jerry Griepentrog
- Aug 30        24    Movants Supporting Affidavit by Michael Jarrett
- Aug 30        25    Movants Memo of Law

- |        |    |  |
|--------|----|--|
| Sep 7  | 26 | PLTF County of Allegany's Affidavit in Opposition to Deft USA's M/Dismiss and in Support of M/Summ/Judgment of Pltf NY |
| Sep 7  | 27 | PLTF County of Allegany's Memo of Law  |
| Sep 7  | 28 | PLTF County of Cortland's Affidavit in Opposition to to M/Dismiss  |
| Sep 7  | 29 | PLTFS County of Cortland's Affidavit os Clarence Rappleyea in Support of Pltfs Motion                                  |
| Sep 7  | 30 | PLTF County of Cortland's Memo of Law in Opposition to Fed/Defts M/Dismiss   |
| Sep 7  | 31 | PLTF County of Cortland's Affidavit in Opposition to Movants M/Intervene   |
| Sep 7  | 32 | PLTF County of Cortland's Memo of Law to M/Intervene   |
| Sep 7  | 33 | PLTF NYS's Affidavit in Opposition to Movants M/Intervene  |
| Sep 7  | 34 | PLTF NYS's Memo of Law   |
| Sep 6  | 35 | AMICUS CURIAE Memo of Law in Support of Defts M/Dismiss  |
| Sep 7  | 36 | PLTF NYS's Notice of Motion for Summ/Judgment, returnable 10/5/90; Supporting Affidavit                                |
| Sep 7  | 37 | PLTF NYS's Rule 10j Statement  |
| Sep 7  | 38 | PLTF NYS's Memo of Law in Opposition to Defts M/Dismiss and in Support of its M/Summ/Judgment                          |
| Sep 14 | 39 | Proposed Intervenors' (States of Washington, Nevada, & South Carolina) Notice of Motion to Dismiss, returnable 10/5/90 |
| Sep 14 | 40 | Proposed Intervenors' "States", Supporting Memo of Law   |
| Sep 14 | 41 | Transcript of Proceedings held before Judge Cholakis on 7/20/90  |
| Sep 21 | 42 | PLTF NYS's Affidavit in Opposition to M/Dismiss by "States"  |

- Sep 21 43 PLTF NYS's Memo of Law  
 Sep 21 MOTION: by Proposed Intervenor for leave to Intervene = Court GRANTS motion to Intervene, motions returnable 10/5/90 are adjourned to 11/2/90; answering papers to be filed by 10/19/90
- Sep 24 44 Letter from Atty Milkman re: personal appearance not necessary for Motion term of 9/21/90
- Sep 24 45 ORDER 9/21/90 (CGC) the Motion for Leave to Intervene is GRANTED; movants are granted intervention in this action as parties deft
- Oct 4 46 STIP/ORDER 10/3/90 (CGC) Defts' & Intervenor's Response to Pltfs' Motions for Summ/Judgment/Oppositions to Defts' Motion to Dismiss will be served on all parties & Court by overnight mail on 10/26/90; Pltfs' Reply papers will be served on all parties & Court by overnight mail on 11/21/90; Oral argument set for 12/7/90
- Oct 5 MOTIONS: Adj. to 11/2/90
- Oct 26 47 Memo of Law of *AMICUS CURIAE* in Opposition to NYS's Motion for Summ/Judgment w/Exhibits
- Oct 29 48 DEFTS (Fed) Cross-Motion for Summ/Judgment and in Opposition to Pltfs Cross-Motions for Summ/Judgment and in reply to Pltfs' Opposition to Defts' Motion to Dismiss, returnable 12/7/90
- Oct 29 49 DEFTS Memo of Law
- Oct 29 50 DEFTS Declaration of Louise Milkman in Support of Motion for Summ/Judgment
- Oct 29 51 DEFTS Rule 10j Statment
- Oct 29 52 DEFTS Compiled Declarations & Exhibits

Oct 16	53	CORRECTED ORDER 10/16/90 (CGC) Granting Motion of "States" to Intervene (caption on Order corrected stating "States" as the Movants)
Oct 30	54	INT/DEFTS "States" Notice of Motion for Summ/Judgment, returnable 12/7/90
Oct 30	55	INT/DEFTS Rule 10j Statement
Oct 30	56	INT/DEFTS Supporting Affidavit of Booth Gardner
Oct 30	57	INT/DEFTS Supporting Affidavit of Robert J. Miller (unsigned)
Oct 30	58	INT/DEFTS Supporting Affidavit of Carroll A. Campbell, Jr.
Oct 30	59	INT/DEFTS Memo of Law
Nov 13	60	INT/DEFTS Affidavit of Robert J. Miller
Nov 2		MOTION: Adj. to 12/7/90
Nov 16	61	Supplemental Declaration of Stephen N. Salomon which corrects an error contained in the Declaration filed as Exhibit A to the Defts' Memo in Support of Cross-Motion for Summ/Judgment filed on 10/26/90
Nov 21	62	PLTF NYS's Reply Affidavit in Support of their Motion for Summ/Judgment and in Opposition to Int/Defts Cross-Motion for Summ/Judgment
Nov 21	63	PLTF NYS's Rule 10j Statement
Nov 21	64	PLTF NYS's Memo of Law
23	65	Plaintiff Allegany County's REPLY MEMO in Opposition to Motion to Dismiss & Cross Motion for Summary Judgment and in Support of State of New York's Motion for Summary Judgment
	66	Plaintiff Cortland County's Memo of Law in Opposition to Intervenor's Motion to Dismiss
Dec 7		MINUTES: Govt's Motion to Dismiss is GRANTED, All other Motions are DENIED

7	67	ORDER: Deft/Govt's Motion to Dismiss is GRANTED, All claims against Defts are dismissed w/prejudice
Dec 26	68	Judgment (mailed copies & notice to litigants re: Time to appeal)
Dec 26		JS-6 Mailed
1991		
Jan 9	69	Transcript of 12/7/90 motion decision by Judge Cholakis in Albany
Jan 23	70	Transcript of 12/7/90 motion held in Albany before Judge Cholakis
Jan 30	71	Notice of appeal by pltf County of Cortland, NY, from 12/26/90 judgment
Jan 30	72	Notice of appeal by pltf County of Allegany, NY, from 12/7/90 order and 12/26/90 judgment
Feb 1		Forwarded copies of Allegany County's notice of appeal and Cortland County's notice of appeal to all appearances
Jan 31	73	Notice of appeal by deft State of New York from 12/7/90 order and 12/26/90 judgment
Feb 1		Forwarded copies of NYS notice of appeal to all appearances
2/4/91		Copy of district court docket entries and notice of appeal on behalf of Appellant County of Cortland filed. [91-6031] Form C due on 2/9/91. Form D Due on 2/9/91. (unj) [91-6031]
2/4/91		Copy of district court docket entries and notice of appeal on behalf of Appellant County of Allegany in 91-6033 filed. [91-6033] Form C due on 2/9/91. Form D due on 2/9/91. (unj) [91-6033]
2/4/91		Copy of district court docket entries and notice of appeal on behalf of Appellant State



- of New York in 91-6035 filed. [91-6035]  
Form C due on 2/10/91. Form D due on  
2/10/91. (unj) [91-6035]
- 2/6/91 Appellant County of Cortland Form C filed,  
with proof of service & attachments.  
[91-6031] Form C deadline satisfied. (unj)  
[91-6031]
- 2/6/91 Appellant County of Cortland Form D filed,  
with proof of service & attachments.  
[91-6031] Form D deadline satisfied. (unj)  
[91-6031]
- 2/7/91 Appellant State of New York Form C filed,  
with proof of service & attachments.  
[91-6035] Form C deadline satisfied. (unj)  
[91-6035]
- 2/7/91 Appellant State of New York Form D filed.  
[91-6035] Form D deadline satisfied. (unj)  
[91-6035]
- 2/8/91 Appellant County of Allegany Form C filed,  
with proof of service & attachments.  
[91-6033] Form C deadline satisfied. (unj)  
[91-6033]
- 2/8/91 Appellant County of Allegany Form D filed.  
[91-6033] Form D deadline satisfied. (unj)  
[91-6033]
- 2/13/91 Scheduling order #1 filed. Record on appeal  
due on 3/8/91. Appellant's brief and appen-  
dix due on 3/15/91. Appellee's brief due on  
4/15/91. Argument as early as week of  
5/6/91. (Pre-Argument Conference sched-  
uled for 2/21/91 @ 11:45 AM). (unj)  
[91-6031]
- 3/13/91 Joint Appendix received. Number of vol-  
umes: 1. Problem: awaiting appellant's brief.  
(onl) [91-6031]



- 3/14/91 Appellees USA, James D. Watkins, Kenneth M. Carr, NRC, Samuel K. Skinner, and Richard Thornburgh in 91-6031 motion for admission pro hac vice of: Jeffrey P. Kehne FILED (w/pfs). (onl) [91-6031]
- 3/14/91 Appellant County of Cortland in 91-6031 brief RECEIVED. Problem: awaiting record on appeal. (onl) [91-6031]
- 3/14/91 Notice of appearance form on behalf of Jeffrey P. Kehne, Edward J. Shawker, Esq., received. (Orig. to Calendar) Edited 3/25/91 in 91-6031, 33 and 35 [mc]. (unx) [91-6031]
- 3/15/91 Appellant County of Allegany in 91-6031 brief RECEIVED. Problem: awaiting record on appeal. (onl) [91-6031]
- 3/15/91 Notice of appearance form on behalf of Edward F. Premo, Esq., received. (Orig. to Calendar) (une) [91-6031]
- 3/18/91 Appellant State of New York in 91-6031 brief RECEIVED. Problem: awaiting record on appeal. (onl) [91-6031]
- 3/18/91 Order FILED GRANTING motion for admission pro hac vice of Jeffrey P. Kehne, Esq. by Appellee Richard Thornburgh, Samuel K. Skinner, NRC, Kenneth M. Carr, James D. Watkins, and USA, endorsed on motion form dated 3/14/91. (onl) [91-6031]
- 3/20/91 Notice of appearance form on behalf of John McConnell, Peter Schiff, Esq., received. (Orig. to Calendar) (une) [91-6031]
- 3/20/91 Record on appeal filed. (Original papers of district court.) (unv) [91-6031]
- 3/20/91 Record on appeal filed. (Original papers of district court.) (unv) [91-6031]

3/20/91 Appellant County of Cortland, New York in 91-6031 brief FILED with proof of service (ono) [91-6031]

3/20/91 Appellant County of Allegany, New York, in 91-6031 brief FILED with proof of service. (ono) [91-6031]

3/20/91 Appellant State of New York in 91-6031, County of Allegany in 91-6031, County of Cortland in 91-6031 joint appendix filed w/pfs. Number of volumes: one. (ono) [91-6031]

3/25/91 Letter, dated Mar. 21, 1991, by appellant STATE OF NEW YORK giving consent for filing of an amicus brief on behalf of The American College of Nuclear Physicians, Et Al. received (onl) [91-6031]

3/27/91 Letter, dated Mar. 27, 1991, by appellant COUNTY OF CORTLAND, giving consent to filing of amicus brief received (onl) [91-6031]

4/1/91 Letter dated Mar. 28, 1991, by appellee USA giving consent to filing of amicus brief by American college of Nuclear Physicians received (onl) [91-6031]

4/1/91 Letter dated Mar. 27, 1991, by amicus AMERICAN COLLEGE OF NUCLEAR PHYSICIANS confirming an amicus brief to be filed by appellee's due date received (onl) [91-6031]

4/1/91 Letter dated Mar. 27, 1991, by Intervenor-Appellee STATE OF SOUTH CAROLINA consenting to filing of amicus brief by Amer. College of Nuclear Physicians received (onl) [91-6031]

4/2/91 Letter dated Mar. 26, 1991, appellees the states of WASHINGTON and NEVADA,

- consenting to filing of amicus brief by Amer. College of Nuclear Physicians received (onl) [91-6031]
- 4/3/91 Letter dated Mar. 29, 1991, by appellant COUNTY OF ALLEGHENY, NY consenting to filing of amicus brief by Amer. College of Nuclear Physicians received (onl) [91-6031]
- 4/8/91 Proposed for argument the week of 5/20/91 in 91-6031, in 91-6033, in 91-6035. (cal) [91-6031 91-6033 91-6035]
- 4/11/91 Notice of appearance form on behalf of James Patrick Hudson, Esq., received. (Orig. to Calendar) (une) [91-6031]
- 4/11/91 Letter by appellee USA resubmitting consent to all parties of the filing of amicus brief received (onl) [91-6031]
- 4/16/91 Notice of appearance form on behalf of Allen T. Miller, Esq., received. (Orig. to Calendar) (une) [91-6031]
- 4/16/91 Appellees USA, James D. Watkins, Kenneth M. Carr, NRC, Samuel K. Skinner, and Richard Thornburgh in 91-6031 brief filed with proof of service Satisfy appellee's brief due. (onl) [91-6031]
- 4/16/91 Appellees State of Washington, State of Nevada and State of SC in 91-6031 brief filed with proof of service Satisfy appellee's brief due. (onl) [91-6031]
- 4/18/91 Set for argument on 5/21/91 at Uscths (cac) [91-6031]
- 4/29/91 Appellant County of Cortland in 91-6031 reply brief filed with proof of service. (onl) [91-6031]

5/3/91 Appellant State of New York in 91-6031  
reply brief filed with proof of service. (onl)  
[91-6031]

5/21/91 Case heard before MESKILL, PIERCE,  
MCLAUGHLIN, C.JJ (TAPE: 232+233)  
(car) [91-6031]

8/8/91 Judgment AFFIRMED by published signed  
opinion filed. (JMCL). (ona) [91-6031]

8/8/91 Judgment filed. (ona) [91-6031]

8/8/91 Judgment AFFIRMED by published signed  
opinion filed. (JMCL). (ona) [91-6033]

8/8/91 Judgment filed. (ona) [91-6033]

8/8/91 Judgment AFFIRMED by published signed  
opinion filed. (JMCL). (ona) [91-6035]

8/8/91 Judgment filed. (ona) [91-6035]

8/27/91 Appellee State of Washington, and State of  
Nevada itemized and verified bill of costs  
received. (ona) [91-6031]

8/29/91 Note: The OPINION PRICE is \$3.60 (rek)  
[91-6031]

9/13/91 Appellee State of Washington, and State of  
Nevada statement of costs taxed in the  
amount of \$61.85 filed. (ona) [91-6031]

9/17/91 Judgment MANDATE ISSUED. (une)  
[91-6031]

9/17/91 Judgment MANDATE ISSUED. (une)  
[91-6033]

9/17/91 Judgment MANDATE ISSUED. (une)  
[91-6035]

10/10/91 Notice of filing petition for writ of certiorari  
for Appellant County of Allegany in 91-6031  
dated 10.3.91 filed. Supreme Ct#: 91-558.  
(ona) [91-6031]

10/15/91 Notice of filing petition for writ of certiorari  
for Appellant State of New York in 91-6031  
dated 9.30.91 Supreme Ct#: 91-543. (ona)  
[91-6031]

**Complaint (dated 2/12/90).**

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

Plaintiffs, by their attorneys, for their complaint against the defendants, allege:

**PRELIMINARY STATEMENT**

1. This is a civil action by a State of the United States and by Counties of that State for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, declaring and adjudging that the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. §§ 2021b-2021i) (the "Act") is unconstitutional because it violates the Guaranty Clause of the United States Constitution, the Tenth and Eleventh Amendments thereto, the Due Process Clause, and constitutionally protected principles of federalism, and that, therefore, the Act should be declared null and void and of no force or effect.

**PARTIES**

2. Plaintiff, the State of New York ("New York"), is a State of the United States of America, which includes within its boundaries the geographic area covered by the United States District Court for the Northern District of New York.

3. Plaintiff, the County of Allegany ("Allegany County"), is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Western District of New York.

4. Plaintiff, the County of Cortland ("Cortland County"), is a political subdivision of the State of New York, located

within the geographic area covered by the United States District Court for the Northern District of New York.

5. Defendant, the United States of America, enacted the statute the constitutionality of which is the subject of this complaint.

6. Defendant, James D. Watkins, is the duly appointed and serving United States Secretary of Energy, and as such he is principally responsible for the administration of the Act.

7. Defendant, Kenneth M. Carr, is the duly appointed and serving Chairman of the United States Nuclear Regulatory Commission.

8. Defendant, the United States Nuclear Regulatory Commission ("NRC"), is a commission of the United States Government created pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. §§ 5841-5851) and is a successor to the Atomic Energy Commission. It is responsible for administration of some aspects of the Act.

9. Defendant, Samuel K. Skinner, is the duly appointed and serving United States Secretary of Transportation, and as such he is responsible for the administration of United States laws governing the transportation of low-level radioactive waste.

10. Defendant, Richard Thornburgh, is the duly appointed and serving United States Attorney General, and as such he is responsible for litigation of actions to enforce the laws of the United States of America.

11. Defendants, Watkins, Carr, Skinner and Thornburgh, are each sued in their official capacities only.

## JURISDICTION

12. The claim of Plaintiffs is founded upon, and jurisdiction of this action is maintained under, 28 U.S.C. §§ 1331, 1337 and 1346. A declaratory judgment and further relief are appropriate under 28 U.S.C. §§2201 and 2202.

## VENUE

13. Venue of this action in the Northern District of New York is proper under 28 U.S.C. §§ 1391(e) and 1402.

## BACKGROUND

14. The Act defines low-level radioactive waste ("LLRW") as radioactive material that: (a) is not "high-level" radioactive waste, spent nuclear fuel, or by-product material as defined at 42 USC § 2014(e)(2); and (b) the NRC classifies as LLRW. 42 USC § 2021b(9). Nationwide, about 90% of the volume and 97% of the radioactivity of LLRW, as so defined by the Act, comes from nuclear power plants and other industrial sources; the remainder comes from research laboratories, hospitals and medical centers.

15. In 1970, after the Atomic Energy Commission discontinued issuance of permits for ocean dumping of LLRW, shallow land burial became the exclusive legal method of disposal. In 1971, six commercial shallow land burial disposal facilities existed in the continental United States, including a LLRW disposal facility at West Valley, Cattaraugus County, New York. By 1978, safety problems and leakage of materials contaminated by LLRW led to the cessation of operation of three of these sites, including the facility at West Valley. New York is now engaged in a program, at substantial cost, to improve the West Valley LLRW disposal facility's capability to safely contain the LLRW already there.



16. At present, only three commercial LLRW disposal facilities are in operation in the United States, to wit: in Nevada, South Carolina and Washington.

17. The United States Congress enacted, on December 22, 1980, the Low-Level Radioactive Waste Policy Act (42 U.S.C. §§ 2021b-2021d) which provided that each State was responsible for the disposal of LLRW generated within its borders. It encouraged, but did not require, States to enter into compacts for the establishment of regional LLRW disposal facilities. It permitted each compact to restrict, after January 1, 1986, the use of its disposal facilities to LLRW generated within the geographic area covered by the compact.

18. Congress subsequently passed the Low-level Radioactive Waste Policy Amendments Act of 1985 ("the Act") (42 U.S.C. §§ 2021b-2021i). The Act sets forth a number of "milestones." They are outlined here.

19. Each State must by July 1, 1986 have joined a compact or certified its intent to site its disposal facilities for LLRW in-state. New York has certified its intent to so site and has not joined a compact. Congress may condition its approval of a compact on the member states' consent to the Act's limitations on state sovereignty. Since New York has not joined a compact, it has not consented, by any such joinder, to the limitations on State sovereignty set forth in the Act.

20. By January 1, 1988 each non-compact State must have prepared a siting plan, which New York has done. By January 1, 1990, each non-compact State must either apply for a license for its disposal facility or certify that it will be able to store, manage or dispose of its LLRW after January 1, 1993. New York provided a certification to the NRC on December 27, 1989. States choosing to so certify must apply for a license by January 1, 1992.



21. By January 1, 1993, if a State cannot dispose of its LLRW, any generators or owners of LLRW in that State may request the State to take title to and possession of LLRW generated, and to assume liability if it fails to do so. In the alternative, such a State must forego rebate to the State of portions of certain surcharges previously collected from the generators by sited States and instead such rebates would be paid to the generators. 42 U.S.C. § 2021e(d)(2)(C).

22. Each State must provide for disposal capacity by January 1, 1996. After that date, unsited States must accept possession of, title to, and liability for any LLRW offered by a generator within that state. After that date, the surcharge repayment alternative is not available. 42 U.S.C. § 2021e(d)(2)(C) states in pertinent part:

if a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State . . . by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996 as the generator or owner notifies the State that the waste is available for shipment.

23. The Act requires that States acquire disposal capacity for three classifications of LLRW. Class "A" wastes have levels of radioactivity that will diminish to the point where after 100 years an inadvertent intruder can safely come in contact with them. Class "B" wastes are more radioactive than Class "A" wastes and less radioactive than Class "C" wastes. Class "C" wastes must be disposed of in a facility that

is designed to protect against inadvertent intrusion for 500 years.

24. Class "A" waste was produced in the United States at the rate of about 1.8 million cubic feet per year in 1987 with annual radioactivity of about 26,000 curies. Class "B" waste was produced in the United States at the rate of about 39,000 cubic feet per year in 1987 with annual radioactivity of about 67,000 curies. Class "C" waste was produced in the United States at a rate of about 8,700 cubic feet per year in 1987 with annual radioactivity of about 180,000 curies. Class "C" waste makes up less than 1% by volume of all LLRW to be disposed of in the nation's facilities, yet it accounts for over 65% of the radioactivity. In other words, the most radioactive LLRW is produced in very small volumes.

25. The annual volume of LLRW shipped for disposal in commercial disposal facilities has dropped by about 55% since 1980 when the Low-Level Radioactive Waste Policy Act was enacted. That volume has dropped since 1985 when the Act was passed. LLRW volumes could drop by another 40 to 50% by 1993 if generators continue to increase their use of LLRW volume reduction techniques. Examples of such techniques include: sorting, decontamination, storage for decay, shredding, incineration and compaction.

26. States and compacts now plan to develop about a dozen LLRW disposal facilities as a consequence of the Act. However, because of technological developments since 1980 and 1985, it is probable that a far smaller number of facilities would accommodate the nation's LLRW.

27. Many disposal costs are fixed and do not vary with the volume of LLRW to be disposed by a LLRW disposal facility. Total disposal costs and unit disposal costs are likely to continue to rise significantly as the annual volume of LLRW falls

and the number of LLRW disposal facilities increases from the three facilities now operating to some higher number built because of the Act.

28. Because of the mandates imposed by the Act, New York was compelled to pass laws providing a structure to accomplish the Federal directive of developing a facility for the disposal of LLRW by January 1, 1996.

29. Under compulsion of the Act, New York enacted a State statute, Chapter 673 of the Laws of 1986. Chapter 673 sets forth a program under which New York: (1) by its Department of Environmental Conservation, would promulgate standards for selecting a disposal method and a site for a LLRW disposal facility; (2) by a Siting Commission, would select a disposal method and a site for a LLRW disposal facility; and (3) by the Energy Research and Development Authority, would build a LLRW disposal facility which would be operational by January 1, 1993. Enactment of a State statute in the nature of Chapter 673 was necessary in order to comply with the Act and to avoid the immediate sanctions for non-compliance with the Act.

30. New York has acted to comply with all three of the milestones of the Act which have already occurred. More specifically, in 1986, New York certified its intent to site its disposal facility for LLRW in-state, rather than elect to join a compact. In 1988, New York prepared a siting plan. In 1989, New York certified to the NRC that New York will be able to store, manage or dispose of its LLRW after January 1, 1993. The Siting Commission provided by Chapter 673 has already identified five potential disposal sites—three in Allegany County and two in Cortland County.

31. New York is proceeding with its site selection process and intends to go forward and continue to comply with the Act pending developments in this lawsuit.

32. The provision of the Act at 42 U.S.C. § 2021e(d)(2)(C) requiring New York to take title to and possession of, and liability for, all LLRW produced within New York (the "take-title" provision) imposes an unreasonable mandate upon New York that is extraordinarily burdensome, compels the expenditure of funds or the incursion of liability without New York's consent, is unprecedented in its intrusiveness, is not of general application to both the public and private sectors, and is preclusive of other options reasonably available to New York, such as requiring generators of LLRW to be liable for its disposal.

33. The Act effectively obligates New York to construct and operate a facility to dispose, not only of Class "A" and "B" wastes, but also of Class "C" wastes. This requirement is unreasonable because Class "C" wastes require special and costly precautions not applicable to Class "A" and "B" wastes, yet Class "C" wastes are produced in such low volume that a proliferation of disposal facilities around the nation for Class "C" wastes is not rational.

34. The need for annual LLRW disposal capacity has declined since Congress passed the Act in 1985 because annual LLRW volumes have declined and are likely to continue to decline. Whatever the national interest in overriding state sovereignty may have been in 1985, that interest is less compelling now.

35. New York has been and continues to be harmed and threatened with further immediate harm by the existence and purported validity of the Act. New York has been compelled to meet the milestones of the Act. Unless the Act is now declared unconstitutional, New York will be forced to continue to exercise its sovereign powers and to spend substantial public moneys before January 1, 1996 to meet the further milestones

of the Act and in order to avoid the risk of liability after January 1, 1996.

36. Allegany and Cortland Counties allege that they have been and continue to be significantly affected by the existence and purported validity of the Act. But for the Act, New York would not have identified as potential disposal sites the sites it has so identified in Allegany and Cortland Counties. Allegany and Cortland Counties allege that the construction or operation of a LLRW disposal facility would significantly affect the county in which such a facility is to be located and the citizens thereof. Allegany and Cortland Counties allege that the identification of potential disposal sites has already caused the counties to incur substantial expenditures for studies, public information, litigation and police services. The counties allege that the public identification of potential disposal sites has had, and will continue to have, significant adverse effects on the social and political fabric of each of the counties.

37. There is now existing between the parties hereto an actual controversy in respect to which Plaintiffs are entitled to have a declaration of their rights and further relief because of the facts, conditions and circumstances as set forth in this complaint.

#### CLAIM FOR RELIEF

38. Plaintiffs repeat and reallege each and every one of the allegations set forth in paragraphs 1 through 37, inclusive, with the same force and effect as if fully set forth at length herein.

39. The Act violates the Guaranty Clause of the United States Constitution, Article IV, section 4, by depriving the citizens of New York of the autonomy necessary to exercise

through their representatives a republican form of government.

40. The Act is an unprecedented infringement of New York's sovereignty because it compels New York, solely because it is a State, to employ its sovereign legislative and executive powers to fund, locate, design, build, regulate and maintain a LLRW disposal facility and, as necessary, to commence and resolve litigation in the Courts of New York in support of the implementation of a national policy dictated to New York by Congress.

41. The Act is an unconstitutional abridgement of New York's sovereignty because it effectively precludes New York from freely employing (if it were so to choose) the sovereign powers, which it would otherwise have available, to condition future generation of LLRW within its borders upon the availability of disposal capacity to be provided by the generator.

42. The take-title provision purports to regulate New York as a sovereign State, compels New York to act and to refrain from acting in matters which are indisputably attributes of State sovereignty, imposes strict, vicarious liability on New York, and impairs New York's ability to structure integral operations in areas of traditional governmental functions, all without any overriding federal interest of a nature which would justify New York's submission.

43. Moreover, extraordinary defects in the national political process render the Act invalid. The take-title provision was not originally proposed by any State or regularly reported out of any Congressional committee. Instead, it was a last minute creation added by Senate amendment to the House bill and accepted by the House of Representatives on the same day, the last day of the 1985 session. The States and their representatives in Congress could not effectively review or debate the



provision before voting on the Act. New York was deprived of the right to effectively participate in the national political process and it was left politically powerless to meaningfully participate. The passage of the Act itself undermined the principles of federalism on which the national political process depends. The national political process did not properly protect the sovereignty of all the States including New York.

44. The Act contains no severability clause and is not severable. Any constitutional portions of the Act are incapable of enforcement as Congress intended, without reference to the unconstitutional portions of the Act. Therefore, any constitutionally defective portion renders the entire Act invalid.

45. The Act is unconstitutional because it unlawfully intrudes on the sovereignty of New York in violation of the Tenth Amendment to the Constitution of the United States.

46. Pursuant to the take-title provision of the Act, the states which are without disposal capacity by January 1, 1996, must, among other things, be liable for all damages, directly or indirectly, incurred by a generator or owner as a consequence of the failure of the State to take possession of the LLRW.

47. The take-title provision of the Act purports to subject New York to vicarious, strict liability without fault by New York if it fails to comply with the milestones of the Act mandated in derogation of New York's sovereignty. The provision purports to make New York liable for damages arising from the claims of generators, owners or persons injured by LLRW, even though New York in effect has been deprived by federal law of the full range of powers which it would otherwise have to prohibit or regulate the generation or importation of LLRW.

48. New York has not consented to be sued for such damages, or to be vicariously liable for the acts of generators and owners of LLRW, in either state or federal courts.

49. The take-title provision of the Act purports to impose liability on New York solely because it is a sovereign state and not because it shares any characteristic of private proprietary generators or owners of LLRW.

50. New York retains its traditional sovereign immunity except for limited waivers of such immunity as specified by statute.

51. The take-title provision of the Act constitutes a coerced waiver of sovereign immunity and Eleventh Amendment immunity because it allows findings of liability against New York, with no such express waiver or uncoerced consent having been given by New York.

52. The Congress of the United States has not made clear its intent to abrogate the Eleventh Amendment immunity of the states by virtue of the Act, and in the absence of such clarity, there can be no abrogation of such Eleventh Amendment immunity.

53. Even if Congress had clearly intended to abrogate the Eleventh Amendment immunity of the states, the Act purports to impose liability on states, solely because they are states and not because of any act or negligent omission of any state, without imposing liability on generators or owners of LLRW.

54. As a result of the foregoing, the take-title provision of the Act violates the Eleventh Amendment to the Constitution of the United States, by purporting to impose liability without New York's consent, and therefore the Act should be declared null and void and of no force or effect.



55. Allegany and Cortland Counties allege that the Act, which is unconstitutional, has injured and will continue to injure them by reason of the substantial expenditures and disruptions caused by the public identification of potential disposal sites in each county. The counties allege that actual construction and operation of a LLRW disposal facility in either county would have significant additional adverse effects on that county.

56. Plaintiffs are entitled to a declaratory judgment declaring the Act unconstitutional, and further declaring that the entire Act is null and void and of no force or effect.

#### REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment on their claim for relief declaring that the Act is null and void and of no force or effect, together with such other and further relief as to the Court may seem just and equitable.

Dated: February 12, 1990

ROBERT ABRAMS

Attorney General of the State of New  
York

Attorney for Plaintiff, The State of New  
York

By: \_\_\_\_\_

DONALD P. BERENS, JR.

Assistant Attorney General

The Capitol

Albany, New York 12224

(518) 473-7190

JAMES T. SIKARAS

County Attorney of the County of  
Allegany

and

HARTER, SECREST & EMERY

Special Counsel

Attorneys for Plaintiff, the County of  
Allegany

By: \_\_\_\_\_

EDWARD F. PREMO, II

700 Midtown Tower

Rochester, New York 14604

(716) 232-6500

BERLE, KASS & CASE

Attorneys for Plaintiff, the County of  
Cortland

By: \_\_\_\_\_

MICHAEL B. GERRARD

45 Rockefeller Plaza

New York, New York 10111

(212) 765-1800

**Affidavit of Delores Cross in Opposition to Motion to  
Dismiss Complaint (dated 9/5/90).**

STATE OF NEW YORK     )  
COUNTY OF ALLEGANY) SS:

DELORES CROSS, being duly sworn deposes and says:

1. I am the Chairman of the Board of Legislators of the County of Allegany, New York ("the County"). I submit this Affidavit in opposition to the motion of the Defendants United States of America, *et al.*, to dismiss the Complaint in the above referenced matter. This affidavit is also submitted in support of the motion for summary judgment of Plaintiff the State of New York.

2. As shown below, the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b *et seq.* ("the Act") mandates that the governments of the State of New York and its political subdivisions become unwilling agents of the national government. The Act forces the States to be "responsible" for low-level radioactive waste generated within the State by either (a) developing a disposal facility either alone or in a compact with other states, (b) assuming title and possession of the waste, or (c) by being subject to liability for any failure to take title and possession. Therefore, the Act requires the State of New York, and its political subdivision, Allegany County, to exercise its sovereign powers to carry out a federal policy. This requirement violates the Guaranty Clause, Article IV Section 4, and the 10th and the 11th Amendments to the United States Constitution.

*A. The Act Violates the Constitutional Guarantee of a Republican Form of Government.*

3. As alleged in the Complaint in this action, New York State has been forced to enact legislation (29 E.C.L. §0101 *et seq.*), regulations (6 N.Y.C.R.R. Part 382) and to proceed with the proposed siting of a low-level radioactive waste disposal facility because of the sanction provisions of the Act. The law and regulations enacted by the State of New York provide for a commission to select a preferred disposal method and site for a low-level radioactive disposal facility to be located in New York State. The various agencies of the State of New York and its political subdivisions are required to "cooperate" in this process.

4. In September, 1989, the New York State Low-Level Radioactive Waste Disposal Siting Commission ("the Commission") designated three potential sites of approximately one square mile in size for a low-level radioactive waste disposal facility in the Allegany County Towns of Caneadea, West Almond and Allen. These three sites were selected from a candidate area previously identified by the Commission.

5. Immediately after a candidate area was identified in Allegany County, the Board of Legislators of Allegany County enacted on January 23, 1989, Resolution No. 45-89. This resolution protested the selection of the County and indicated the "irrevocable" opposition of Allegany County to the location of a disposal facility in the County. A copy of this resolution is annexed hereto as Exhibit A. On February 9, 1990, the Board of Legislators passed Resolution No. 63-90 authorizing the County to join as a plaintiff in this action to challenge the constitutionality of the Act. A copy of such resolution is annexed hereto as Exhibit B.

6. On various dates during late 1989 and the early part of 1990, the Commission attempted to gain access to the three sites in Allegany County to initiate so-called "precharacterization" studies. The Commission was prevented from entering such sites by citizens of Allegany County. Unfortunately, these confrontations have resulted in numerous court proceedings and the arrests of citizens of Allegany County. The last incident in April, 1990, lead to an episode between Troopers of the State of New York Police and citizens of the County who were on horseback. A newspaper article describing this confrontation is annexed hereto as Exhibit C.

7. The citizens of Allegany County by public comment to the Board of Legislators, town boards and by the actions of various citizens' groups have made clear that they oppose the possible location of a low-level radioactive waste disposal site in Allegany County. Various businesses and educational institutions have also expressed their opposition to such a facility in the County. The Board of Legislators and County officials have all agreed that such a disposal site would be deleterious to the County.

8. Nevertheless, the County has been forced by the terms of the Act and resulting actions by the State of New York to act as "agents" to carry out the policy of the Act.

9. For example, the Sheriff of Allegany County has been forced to serve civil process and to accompany members of the Commission Staff on various attempted visits to the potential sites. Allegany County facilities such as the County jail, County Courthouse and other buildings have been used for the purpose of holding citizens who have been charged with impeding the actions of the Commission. The Allegany County District Attorney and his staff have been forced to become involved in criminal prosecutions of citizens who allegedly illegally impeded the siting process. At various

times the State of New York has indicated that the County may have to invoke the "mutual aid" system for additional police protection. Once such "mutual aid" is requested, the County becomes financially liable for the service provided. Innumerable hours have been spent by officials of Allegany County in setting up procedures to attempt to avoid violence during the siting process.

10. All of these actions and expenditures of funds are the direct result of the Act, and the resulting State government reaction, and are against the wishes of the citizens of Allegany County. The various officials of Allegany County, against their will and the will of their constituents, have become agents of the federal government and forced to carry out the Congressional mandate with respect to low-level radioactive waste.

11. The Act has caused damage to the vital relationship between the people of Allegany County and their elected representatives. The compact between them has been broken. The United States Constitution, Article IV Section 4, guarantees to the States a Republican Form of Government—one in which the people control the government. However, the government of the State of New York and the government of Allegany County, with respect to the issue of low-level radioactive wastes, are no longer controlled by their citizens but by the federal government. The State and County governments have been forced and will be forced to exercise their sovereign powers, including police powers, eminent domain and taxing powers to execute a policy that our citizens vehemently oppose. Certainly, nothing could be more destructive of the "Republican Form of Government" than this.

*B. The Act has Jeopardized the Future of the County.*

12. The mere designation of the County as potential sites for low-level radioactive waste disposal facility have harmed the County financially. In order to respond to the work of the Commission and to insure the health and welfare of its citizens, the County has been forced to expend considerable funds for special legal and technical consultants. If the siting process continues, the County will be forced to expend funds for consultants to be involved in studies concerning disposal methods, the Commission's environmental impact statement, preparation for adjudicatory hearing on method selection, review of the siting process and resulting adjudicatory hearing and the provision of public information for the Allegany County community. As the process continues, the financial impact on the County will only increase. The County has approximately 50,000 residents and the financial impact on each of them for such activities is severe.

13. Moreover, individual County landowners have been harmed by the County being named as a potential site. Land values in the affected areas have dropped. Loans for further development of these properties and neighboring properties will be difficult, if not impossible, to obtain.

14. The citizens of the entire County, and, in particular, the citizens of the affected areas, have been subject to emotional stress and duress. Given the history of the nuclear industry in this country, this concern is understandable. The combination of operational practices, water infiltration and seepage through trench caps led to the closure of the West Valley, New York facility only 12 years after opening. The West Valley facility is located only fifteen miles away from the border of Allegany County. The Maxey Flats, Kentucky site also experienced an ingress of water which led to the migration of harmful radio-nuclides from the burial sites. Cleanup costs at various radio-



active waste disposal sites across the country have ranged from \$7 million to billions of dollars.

15. Our citizens are not only concerned for their own welfare and the natural resources around them, but for their children's and grandchildren's future. The very real potential of debilitating cancerous diseases and genetic damage has frightened our citizens. This has led many people to pledge that they will do whatever is necessary to prevent the siting of a facility in Allegany County. Many County officials have grave concern for the potential of violence in our County.

16. The potential impact of the siting of a disposal facility on the County's industries would be severe. Agriculture is Allegany County's leading industry at this time. The three potential sites in the County include many acres of land which contain valuable soil groups and which have potential for active agricultural development. The County also relies heavily upon groundwater in the area for drinking water. All of the three sites in Allegany County are located within close proximity of potentially very productive aquifers of the Genesee River Valley. The Genesee River Valley could be a supply of potable water for the future growth of Allegany County if it is properly protected.

17. There are also untapped reserves of oil and gas that are located in the County. With the quickly rising price of petroleum products and the crisis in the Persian Gulf, these resources are becoming more competitive for development. Yet, the potential of a siting of a low-level radioactive waste disposal facility endangers such vital development. Oil and gas wells have been drilled throughout the County since the 1860s. Any leakage of radionuclides could quickly migrate and might contaminate oil and gas reserves rendering them useless. Certainly, no development of oil and gas reserves could take place at the site of a disposal facility.



18. The quality of life in Allegany County would be dramatically affected by the location of a low-level radioactive waste disposal site in the County. The stigma associated with such a site would certainly have severe consequences for area business, tourism and the day to day lifestyle. Already, the leaders of the Amish community located in Allegany County, which constitutes an important part of the agricultural community, have indicated that their community will move from the County if such a disposal facility is located here. Many other citizens have made the same statement to me. One can only imagine that with people unwilling to live in the County, businesses would soon leave because of the lack of employable workers and customers.

19. Even if the State were to decide not to build such a facility, Allegany County and its citizens would be affected by the Act. A decision by the State of New York not to build a disposal facility would result in the State of New York being liable for the low-level radioactive waste generated in the State. The resulting drain on the State treasury is incalculable and would certainly result in increased taxes for the citizens of Allegany County and a lack of funds from the State to Allegany County for needed programs.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Court deny the Defendants' motion to dismiss the Complaint in the above referenced matter and grant the motion of the State of New York for summary judgment declaring the Act to be unconstitutional.

(Sworn to by DELORES CROSS, September 5, 1990.)

**Exhibit A—Resolution No. 45-89.**

**TITLE: IRREVOCABLY OPPOSING THE SITING OF A  
LOW-LEVEL RADIOACTIVE WASTE DIS-  
POSAL FACILITY IN ALLEGANY COUNTY;  
DEMANDING A THOROUGH RESEARCH AND  
INVESTIGATION BY STATE OF COUNTY  
ISSUES AND CONCERNS**

Offered by: Planning and Historical Committee

WHEREAS, the Allegany County Board of Legislators, pursuant to Resolution No. 23-89, initially determined that the siting of a low-level radioactivity waste disposal facility would not be in the best interest of Allegany County, and

WHEREAS, the Planning and Historical Committee of the Board was directed to report to this Board appropriate proposals or positions in regard to the siting of a low-level radioactive waste disposal facility in Allegany County, and

WHEREAS, the Planning and Historical Committee has received both public and local government opinion as to the local impacts such siting would create if established in the County, and

WHEREAS, the Planning and Historical Committee has rendered its report to this Board, and

WHEREAS, from such report it appears that the State selected candidate area within Allegany County is not suitable for the siting of such facility due to the existence of principal aquifers in such area and the threat to them should facility failure occur, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility since such area has the highest rate of soil and streambank erosion in New York State and this poses a threat of damage to such facility, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the close proximity of Keaney Swamp and the potential threat to this resource should facility failure occur, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the close proximity of such area to the Clarendon-Linden Fault and to several geologic thrust faults under such area, which exacerbate the potential for facility failure if an earthquake occurs, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the existence of known, and the potential existence of yet unidentified, gas and oil wells, be they producing, non-producing or exploratory, within such area, that would provide pathways of migration for radionuclides should facility failure occur, and

WHEREAS, it further appears that the mineral resources, particularly oil and natural gas, within such area, are abundant based on levels of past exploration, and that the siting of such facility could eliminate the extraction of these resources, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the close proximity of such area to the Genesee River, a major ground water discharge zone, which serves as a source of potable water for residents north of such area along its entire course to Lake Ontario, and

WHEREAS, it further appears that such area is not suitable for the siting of such facility due to the great distance of such area from major low-level radioactive waste generators in

New York State, in that such distance creates an increased probability and threat of vehicular accident in the transporting of radioactive waste thereby heightening the danger to residential communities and compromising the public safety, and

WHEREAS, it further appears that the siting of such facility would result in a detrimental impact to the potential growth, both economic and social, of Allegany County that is expected to occur through implementation of the New York State sponsored Ceramic Corridor Program at and in the vicinity of Alfred, New York, and

WHEREAS, it is the opinion of the Planning and Historical Committee that the New York State Low-Level Radioactive Waste Siting Commission Document entitled "Candidate Area Identification Report" data utilized and applied in selecting such area that is stale and of questionable accuracy, now, therefore, be it

**RESOLVED:**

1. That this Board of Legislators of the County of Allegany irrevocably opposes the siting of a low-level radioactive waste disposal facility in Allegany County.

2. That demand is hereby made that the New York State Low-Level Radioactive Waste Siting Commission and the New York State Department of Environmental Conservation thoroughly research and investigate the social, economic and environmental issues and concerns set forth in this resolution in the event the Allegany County candidate area remains a potential siting for such facility.

I, Linda J. Canfield, Clerk of the Board of Legislators of the County of Allegany, State of New York do hereby certify that the foregoing constitutes a correct copy of the original on file

in my office and the whole thereof of a resolution passed by said Board on the 23rd day of January, 1989.

Dated at Belmont, New York this 23rd day of August, 1990.

Linda J. Canfield  
*Clerk, Board of Legislators*  
*Allegany County*

Moved by Cross    Seconded by Saylor    VOTE: Ayes 15  
Noes 0    Absent 0

**Exhibit B—Resolution No. 63-90.**

**TITLE: A RESOLUTION TO JOIN AS A PLAINTIFF WITH THE STATE OF NEW YORK AND CORTLAND COUNTY IN AN ACTION TO DECLARE THE FEDERAL LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985 UNCONSTITUTIONAL; AUTHORIZING COUNTY ATTORNEY AND SPECIAL COUNSEL TO ACT AS COUNSEL; PROVIDING THAT COUNTY PARTICIPATION IN SUCH ACTION SHALL BE WITHOUT PREJUDICE TO CERTAIN ENUMERATED POSITIONS OF THE COUNTY; REQUESTING STATE OF NEW YORK TO CEASE SITING PROCESS AND TO BRING A PRELIMINARY INJUNCTION MOTION TO STAY ENFORCEMENT OF SUCH ACT.**

Offered by: Ways and Means Committee

WHEREAS, on or about January 15, 1986, the Congress of the United States passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the Act") which provided that each State was responsible for the disposal of low-level radioactive waste ("LLRW") generated within its border, and

WHEREAS, the Act provided that each State not participating in an interstate compact for the disposal of LLRW generated with the State, and

WHEREAS, any State that fails to prepare such a disposal plan and to implement such plan on certain milestone dates is subject to the loss of certain funds collected by the federal government, barred from shipping LLRW to interim disposal facilities and required to take either title and possession of the LLRW generated or to assume liability for such LLRW, and

WHEREAS, the State of New York, because of the coercive provisions of the Act, enacted into law Environmental Conservation Law § 29-0101 *et seq.* which established a siting commission to select a disposal method and a site for a LLRW disposal facility, and

WHEREAS, in September, 1989, the siting commission selected three potential sites in Allegany County and two in Cortland County for the siting of such disposal facility, and

WHEREAS, the Board of Legislators of Allegany County and various citizens groups have protested the methodology and conclusions of the siting commission, and

WHEREAS, the Board of Legislators of Allegany County and various of its citizens have protested to the Governor of the State of New York the State's actions and have raised the issue of the constitutionality of the Act, and

WHEREAS, the Governor of the State of New York, Mario Cuomo, instructed the Attorney General of the State of New York, Robert Abrams to commence an action to challenge the constitutionality of the Act, and

WHEREAS, in January of 1990 the Attorney General's Office contacted special counsel for Allegany County, Harter, Secrest & Emery, and requested that Allegany County and Cortland County join as plaintiffs with the State of New York in the federal court action challenging the constitutionality of the Act, and

WHEREAS, Cortland County has decided to join in such action, and



WHEREAS, special counsel for Allegany County, Harter, Secrest & Emery has recommended that the County join in such action, now, therefore, be it

RESOLVED:

1. That the County of Allegany join as a plaintiff with the State of New York and the County of Cortland in an action seeking to declare the Act unconstitutional.

2. That the County Attorney, James T. Sikaras, and Special Counsel, Harter, Secrest & Emery, are authorized to act as counsel for the County of Allegany in such action.

3. That the County Attorney and Special Counsel inform the State of New York that participation of the County of Allegany in this action is without prejudice to the County's position that (1) the siting process should be stopped; (2) that the siting commission's methodology and conclusions have been flawed; and (3) that the low-level radioactive waste disposal facility should not be located in Allegany County.

4. That the County Attorney and Special Counsel are directed to request the State of New York to immediately cease the siting process and to request the State of New York to bring a preliminary injunction motion staying the enforcement of the Act.

PREPARED BY COUNTY ATTORNEY PER FEBRUARY 8, 1990 ORDER OF BOARD CHAIRMAN.

I, Linda J. Canfield, Clerk of the Board of Legislators of the County of Allegany, State of New York do hereby certify that the foregoing constitutes a correct copy of the original on file

in my office and the whole thereof of a resolution passed by said Board on the 9th day of February, 1990.

LINDA J. CANFIELD  
Clerk, Board of Legislators, Allegany  
County

Dated at Belmont, New York this 9th day of February, 1990.

Moved by Saylor    Seconded by Watson    VOTE: Ayes 15  
Noes 0    Absent 0

**Exhibit C—Newspaper Article.**

Allegany County

**TWO INJURED IN PROTEST AT SITE; 39 ARE  
ARRESTED**

By JOHN T. EBERTH  
and MARK WHITEHOUSE  
Times Herald Staff Writers

CANEADEA — Two people—a state trooper and a protester — were injured Thursday in a clash between protesters and police as the state's radioactive waste siting commission tried to get onto the proposed nuclear disposal site in Caneadea.

Thirty-nine people were arrested, two on felony charges and the others on charges of disorderly conduct. Disorderly conduct constitutes a violation.

State police, the county sheriff, and a three-man team from the siting commission had gotten past several barriers and were heading toward the site on foot when nine masked protesters on horses came toward them.

A horse stepped on the foot of State Police Sgt. Samuel Taglienti, who is based in Boston, N.Y. He was treated and released at Jones Memorial Hospital for the injury. It is still unknown how serious the injury is, although Troop-A Commander Lt. Charles McCole said Sgt. Taglienti's foot was not broken.

Also injured was Karl J. Root, 28, of Bolivar, who was reportedly riding the horse that stepped on the sergeant's foot.

He was taken into custody, then treated at Jones Memorial Hospital for bruises and abrasions on one hand and "soft-tissue injuries" on the other hand, said his lawyer, Patricia Fogarty.

ROOT WAS charged with second-degree assault, a class C felony; attempted second-degree assault, a class D felony, and resisting arrest.

Another of the riders, Donald W. Middaugh, 23, of Friendship, was charged with second degree attempted assault and resisting arrest. He was reportedly not hurt.

Protesters were shouting "Police brutality" and "Way to go, New York's finest!" as the two horsemen were escorted away.

The siting commission did not reach the Caneadea site. Lt. McCole called off the attempted walkover after the incident with the horses, saying he couldn't justify risking further violence.

County Sheriff Larry Scholes said the siting commission reported no plans to return for another walkover attempt "They plan to leave this in (Supreme Court Justice Jerome Gorski's) hands," he said. "They're going to try the injunction route."

The commission has an injunction barring anyone from interfering with its attempts to get on the three potential Allegany County dump sites; violators are subject to a maximum \$1,000 fine and 30 day's imprisonment.

BOTH MIDDAUGH and Root were taken to Wellsville state police headquarters for processing. They were later arraigned before Willing town justice Richard Tompkins, who released both men on their own recognizance. They are scheduled to return to court at 8 p.m. April 25, although the case may be transferred to another court before that, Ms. Fogarty said. She said she is not sure who will ultimately represent the two men. She and three other attorneys have volunteered to work with Alfred attorney Jerry Fowler to represent protesters. The nine horses bearing masked riders met the police on East Hill Road at 1:45 p.m.

The lead horse, driven at a gallop, nearly ran into the line of police. One trooper in front had to veer away to avoid being hit

by the horse. The other horses were then turned sideways and walked in front of the troopers to stop their advance.

At that point, several troopers drew their night sticks and attempted to continue their advance.

POLICE TOOK the reins of one horse and attempted to arrest its masked rider. But the rider refused to dismount, nearly toppling the horse as troopers attempted to pull him off it.

Several troopers attempted to separate the man from his mount, but the reins were wrapped around his hands. One trooper used the short end of his baton to rap the man's hands free. He was then dragged to the ground and handcuffed.

At 1:52 p.m. two of the horsemen had been arrested and Lt. McCole called off the advance.

"I think we used what necessary force was needed to complete the arrest," said State Police Lt. Charles McCole after the incident.

Afterward, Lt. McCole said he was confident his troopers could have gotten the commission onto the site, but said he called off the advance to avoid further violence.

"An incident took place that I thought could have resulted in a short-term riot," he said. "At that time we decided to disengage."

LT. MCCOLE SAID he felt "one of the horses brush up against me," and that he was concerned for everyone's safety when the horses blocked the road.

He called the uses of the horses to block the troopers "an unnecessary and dangerous act."

"Masked men on horses — it's like something out of the wild west," he added.

Several protesters said state police may have violated the civil rights of those arrested and may have used unnecessary violence.

"If someone wants to file a complaint and they don't feel comfortable talking to me, there is a troop commander in Batavia they can talk to," Lt. McCole told them.

"As to the conduct of my troopers, I'm extremely proud of them," he said. "If you believe there has been a violation of anybody's civil rights, the FBI is the agency that would handle the complaint," Lt. McCole added.

Bruce Goodale, director of the site-selection process, witnessed the fracas but hinted the violence won't dissuade him from attempting to conduct a site walkover at Caneadea in the future.

"Today is today and tomorrow we have to make our plans based on what we learned today," he said. "Obviously we're not getting on the site today so we'll have to quit." On Thursday, Sheriff Scholes said he supported Lt. McCole's decision to pull out of Caneadea. "It was a dangerous situation," the sheriff said. "It was dangerous from the word 'go,' not because of the troopers."

He said introducing horses into the situation was an unwise decision.

**Affidavit of Cindy M. Monaco in Opposition to Motion  
to Dismiss Complaint (dated 9/5/90).**

Cindy M. Monaco, being duly sworn, deposes and says:

1. I am the Cortland County Low-Level Radioactive Waste (LLRW) Coordinator. My office is located in Room 204, County Office Building, 60 Central Avenue, P.O. Box 5590, Cortland, New York 13045.

2. I have been employed in this position since 3 February 1989. My responsibilities as the coordinator on the LLRW issue include research regarding the generation and management of LLRW and the education of the public on such matters.

**GENERATION OF LLRW**

3. LLRW is commercially generated from a variety of sources, which include the generation of electricity by the utilities, industrial research and manufacturing processes, diagnostic and medical services, and government research. (DOE/LLW-69T)

4. In reporting information concerning LLRW production, commercial generators provide figures regarding both volume and radioactivity. In terms of judging the biological hazard associated with the waste, it is the amount of radioactivity which is the significant factor.

5. Since 1983, in reporting information regarding volume and radioactivity of LLRW produced in the nation, five (5) categories were established which indicate the source of commercially generated LLRW. These categories consist of utility, industrial, medical, academic, and government waste.



6. Although the relative contributions to the waste stream from each of the generators and the total amounts of waste produced may vary drastically from year to year, nuclear power generation accounts for the majority of the volume and radioactivity of the nation's commercially generated LLRW.

### RELATIVE CONTRIBUTIONS TO THE WASTE STREAM

7. The *1987 State-by-State Assessment of Low-Level Radioactive Waste Received at Commercial Disposal Sites* (DOE/LLW-69T, Tyron-Hopko and Ozaki, 1988) shows that, in 1987, utility, industrial, government, academic, and medical waste accounted for 51.0%, 39.1%, 7.1%, 1.6%, and 1.2%, respectively, of the volume of commercially generated LLRW in the United States. The radioactivity, which is the pertinent statistic regarding biological hazard, is reported as follows: utility - 81.6%; industrial - 15.6%; government - 2.6%. The radioactivity due to medical and academic sources was negligible.

8. According to the New York State LLRW Siting Commission's *Executive Summary—Source Term Report: Low-Level Radioactive Waste Projection for New York* (July 1989), 98% of the total radioactivity to be deposited in a 60-year New York State facility will be due to utility waste. Nuclear power generation is expected to account for 70% of the total volume to be deposited in the proposed New York State facility. (These figures include decommissioning and dismantling of two nuclear power reactors.)

9. Since the preparation of the Siting Commission's *Source Term Report*, Cintichem, Inc., an industrial generator of radiopharmaceuticals, has ceased production. This results in revised estimates concerning the relative contribution of New York State's generators to the waste stream. With the elimination of

Cintichem's waste stream, nuclear power plant waste is expected to account for more than 99% of the total radioactivity to be deposited in the 60-year New York State facility.

10. According to the Siting Commission's estimates, medical and academic waste is expected to account for less than 0.2% of the total radioactivity in the proposed New York State facility.

### CLASSIFICATION OF LLRW

11. In accordance with United States Nuclear Regulatory Commission (NRC) regulations, the low-level waste stream is divided into three (3) categories: Class A, Class B, and Class C. As per NRC regulations, Class A, B and C wastes would require isolation from the environment for 100, 300, and 500 years, respectively.

12. The classification scheme for LLRW is determined solely by the federal government, specifically the NRC in 10 CFR Part 61. Classification into the A, B, and C categories depends on an interplay between isotope concentration and half-life (the amount of time it takes for half of the mass of a radioactive substance to decay). "In general, 'Class A' wastes contain either very low concentrations of radioactive materials with long half-lives, or relatively low concentrations of radioactive materials with short half-lives; 'Class C' wastes can contain moderate concentrations of long-lived radioactive materials, or high concentrations of radioactive materials with short half-lives. 'Class B' wastes are intermediate in their content of long- and short-lived radioactive materials." (New York State Department of Health, *General Information on Low-Level Radioactive Waste Disposal in New York State*). Some examples of isotopes found in LLRW and their associated half-lives include:

Iodine-129 (16 Million Years); Thorium-232 (14 Billion Years); Uranium-235 (704 Million Years); Uranium-238 (4.7 Billion Years); Cobalt-60 (5.27 Years); Tritium (12.3 Years). (Figures are from NYSERDA, *1988 NYS LLRW Status Report*, June 1989). In determining waste classifications, the NRC regulations do allow for concentration averaging and, hence, dilution of the waste forms.

13. In general, a radioactive substance which has undergone ten to twenty decay periods (half-lives) is deemed to have reached background levels in terms of its radioactivity content. While the NRC has specified isolation periods of 100, 300, and 500 years for Class A, B, and C wastes, respectively, this does not mean the emissions from those materials have reached background levels. Clearly, given the long half-lives of a number of the isotopes found in LLRW, the radiological component of a variety of low-level wastes will persist in the environment for periods well beyond the time intervals prescribed by the NRC.

14. A subset of the low-level waste stream which is proving to be extremely problematic is "mixed waste". Mixed waste is waste that is classified as both radioactive waste and hazardous. It is dually regulated by the NRC and the United States Environmental Protection Agency (EPA) for its radiological and hazardous components, respectively. In its November 1989 report, *Partnerships Under Pressure*, the office of Technology Assessment (OTA) reported:

Some specific regulations cannot be met, some regulations may be in conflict and inconsistent, and other regulations overlap and are duplicative. Although mixed LLW (low-level waste) comprises less than 10 percent of all LLW, it has been identified by States as their major concern in managing LLW. No disposal facility for mixed LLW has been available since 1985.

Also, no offsite storage or treatment facility is available. Since mixed LLW is a subset of LLW, States will have to be able to manage their mixed LLW if they are to meet the milestones of the LLRWPA.

Current disposal figures do not include mixed waste volumes since no disposal sites exist which accept these materials. According to the OTA, "It is estimated that mixed LLW would increase the national volume of nonmixed LLW by 3 to 10 percent."

15. Typically, Class A material, the least hazardous constituent of the waste stream, comprises the largest percentage of the total volume of waste produced; yet, Class A waste accounts for a very small portion of the total radioactivity. In sharp contrast, Class C waste generally accounts for a minor percentage of the total LLRW volume, but comprises the vast majority of the radioactivity.

16. The Siting Commission's *Source Term Report* (July 1989) projects that, in a 60-year New York State facility, Class C waste will account for 93.6% of the total radioactivity of the waste stream. (Class A and B materials will account for 3.1% and 3.3%, respectively, of the total radioactivity.)

#### WASTE GENERATION & MANAGEMENT: CLASS A vs. CLASS C

17. With the exception of sealed sources, in both New York State and the rest of the nation, LLRW produced by medical and academic institutions is Class A waste. The New York State Energy Research & Development Authority's (NYSERDA's) *1987 Low-Level Radioactive Waste Status Report* shows that, in New York State in 1987, only 60 cubic feet (0.3 curies) of Class C waste was due to medical and academic sources. The remaining 24,152 cubic feet of medical

and academic waste was Class A material. In New York State in 1988, all 16,522 cubic feet of medical and academic waste was Class A (NYSERDA, 1989). On a national level in 1987, medical and academic generators shipped 72 cubic feet, and less than 2 curies, of Class C waste for disposal.

18. According to NYSERDA (June 1989), in New York State nuclear power reactors were solely responsible for the generation and disposal of 12,800 curies of Class C waste in 1988. In addition, the vast majority of Class C waste which is expected to be disposed in the proposed New York State facility will be due to nuclear power generation and will include irradiated reactor components, resins, filters, and sludges. On a national level, utility waste accounted for the shipping of 7,485 cubic feet and 175,023 curies of Class C waste. In 1987, utility generators accounted for more than 99% of the total radioactivity of the Class C waste that was shipped for disposal in the nation (Tyron-Hopko & Ozaki, December 1988).

19. According to *The 1987 State-by-State Assessment of Low-Level Radioactive Wastes Received at Commercial Disposal Sites* (Tyron-Hopko & Ozaki, December 1988), Class C waste accounted for only 0.5% of the nation's total volume of commercially generated LLRW that was shipped for disposal. Elimination of the requirement for state responsibility of Class C waste will not create an "orphan" waste for which management capabilities will not exist. The volume of Class C waste represents an insignificant percentage of the total volume of LLRW generated in the U.S. If a federal high-level radioactive waste (HLRW) repository is developed, the addition of Class C LLRW should pose no technical or health and safety difficulties. In the likely event that development of a HLRW repository is delayed, Class C waste could be temporarily stored at the reactor site with the spent fuel. Given the small volume of Class C waste and its activity, which is no greater



than HLRW, this alternative should result in no unresolved technical or safety issues.

20. Management requirements (waste form, packaging, institutional control period, level of shielding) for Class A waste differ greatly from those for Class B and C materials. Thus, the provisions required for the safe management of virtually all medical and academic waste are very much different from those needed to effectively manage utility waste.

### TRENDS IN WASTE GENERATION

21. The passage of the LLRW Policy Act of 1980 was due, in part, to the increasing volumes of waste which were being produced at the time (GAO/RCED-83-480). A 1983 General Accounting Office (GAO) report indicates that the Department of Energy (DOE), in 1980, projected that a total of five (5) to seven (7) disposal sites would be needed nationwide by 1990 in order to dispose of the country's commercially generated waste. This was prior to the advent of waste reduction techniques (such as supercompaction, incineration, and decontamination) which have drastically decreased the volume of LLRW generated nationally. In 1980 the nation generated 3.77 million cubic feet of commercial LLRW. By 1988, the U.S. generated 1.43 million cubic feet of commercial LLRW, which represents a national decrease of 62%. Thus, the DOE projections severely overestimate the number of disposal sites necessary to accommodate the nation's LLRW.

22. In *Partnerships Under Pressure* (November 1989), the OTA reported that, by 1993, waste volumes could decline another 50% from 1988 figures. The OTA cautions that volume is a major determinant of unit disposal cost. Smaller volumes will mean higher per unit disposal fees because of the fixed nature of many of the development and maintenance costs associated with LLRW disposal sites. With the nation's

shift to a dozen or more facilities, unit disposal costs are expected to rise dramatically. It is unclear if medical and academic generators will be able to afford to use the new facilities.

### ECONOMIC VIABILITY

23. It has been estimated that 300,000 to 400,000 cubic feet of LLRW is required to make one disposal facility economically feasible. In several of the existing compacts and in the case of New York State, projected volumes fall well below those limits. New York State is expected to produce an average of approximately 100,000 cubic feet per year over a 60 year period.

24. In addition, in New York State, there is nothing to preclude generators from shipping waste out-of-state for disposal in the event that an out-of-state facility is amenable to accepting such waste. This further jeopardizes the economic viability of the disposal site.

25. Finally, the NRC recently released a policy statement concerning exemptions of certain portions of the low-level waste stream from regulatory control. According to the Nuclear Information and Resource Service, such a policy, if adopted into regulation, would eliminate approximately 30 percent of the volume of waste which is currently classified as LLRW. This additional decrease in waste volume would further jeopardize the economic viability of many of the planned disposal facilities.

### DISPOSAL FEES

26. The Michigan Department of Management and Budget (Detroit Free Press, 16 March 1989) estimated the cost of developing a single disposal facility at \$300 million. It further



estimated the unit disposal fees at the proposed Michigan facility to be in excess of \$300 per cubic foot. (By comparison, as of February 1990, the estimated cost of disposal at the proposed California facility was \$140 per cubic foot.)

27. A 6 June 1988 report from Washington State Senator Williams to Phil Moeller, Lead Analyst of the Energy & Utilities Committee, examines the implications which are likely to result from the Hanford facility becoming an in-region only site. The basic disposal fee is anticipated to more than double once the site restricts itself to accepting waste from only its compact members.

28. The OTA estimates that, depending on waste volume and disposal technology, per cubic foot disposal fees for non-mixed LLRW could vary from \$50 to \$590.

29. According to reports presented at the 12th Annual DOE LLW Management Conference, the cost of mixed waste disposal is anticipated to be approximately \$15,000 per cubic foot. Moreover, the need to accommodate mixed waste is expected to add a cost of several million dollars to the development of each of the LLRW disposal facilities which is currently planned. The federal government, specifically the DOE, accounts for approximately 97 to 99 percent of the mixed waste that is produced nationally. Commercial generation of mixed waste (civilian and government) accounts for a mere 1 to 3 percent. (Figures were provided by Dr. John Randall, NYS LLRW Siting Commission.)

30. Even in cases where states have entered into compacts, the economic viability of disposal facilities is questionable. This was clearly illustrated by Chem Nuclear's decision not to bid on the construction and operation of a disposal facility for the Central States Compact. Chem Nuclear believed that the projected waste stream was too small to allow the operation to

be economically viable (C. Bullard & H. Weger, LLRW disposal: Economies of scale and half-life segregation, Proceedings from Waste Management 1990, Tuscon, Arizona). In 1987, the Central States Compact shipped 152,224 cubic feet of LLRW for disposal (Tyron-Hopko & Ozaki, December 1988).

31. According to C.W. Bullard & H.T. Weger (LLRW disposal: Economies of scale and half-life segregation, Proceedings from Waste Management 1990, Tuscon, Arizona), a report by the Electric Power Research Institute demonstrates that, if only four (4) new disposal sites were developed in the nation, a \$2.8 billion savings in operational and capital costs could be achieved.

#### ON-SITE STORAGE

32. The need for long-term on-site storage is apparent if one examines the status of siting activities in virtually all of the states and compacts. For example, Texas is involved in litigation which is expected to delay the process by at least two years. According to Chem Nuclear officials, the development of the North Carolina facility, to be used by the Southeast Compact, is experiencing a 21 month delay. The siting process in Nebraska, host state of the Central Interstate Compact, has experienced fierce public opposition. In Illinois the entire process is being independently reviewed. In New York State, recently enacted legislation has drastically altered the nature of the siting process and is expected to require more time for method and site selection and review of work done to date. With regard to the issue of mixed waste disposal, none of the states or compacts has made significant progress, and at this point it seems unlikely that any state or compact will be capable of disposing of all its LLRW by the January 1, 1996 deadline.

33. For the majority of states, including New York, interim management provisions involve on-site storage at the point of generation, and, in most instances, effective LLRW management in states and compacts will *require* longer term on-site storage than was originally anticipated. For most of the power plants, five (5) year storage capacity already exists. This capacity could be increased by the utilities' applying to the NRC for a license amendment.

34. The majority of medical and academic wastes contains short-lived isotopes in low concentrations. This portion of the low-level waste stream can be (and often is) stored on-site for decay. The material, after going through a sufficient number of half-lives, can then be disposed in a regular landfill. No comprehensive data set currently exists which objectively evaluates the ability of LLRW generators to store waste on-site for decay.

35. In late May 1990, the NRC, without the benefit of public input, issued a policy statement which indicates that, as of 1996, the NRC will not "look favorably" on point-of-generation storage at reactor sites. See Exhibit A (attached hereto). The memo contains no discussion of the technical justification for this policy, nor does it define any pertinent health or safety issues which may have affected its decision making.

36. The LLRW Policy Act of 1980 (LLRWPA) and the LLRW Policy Amendments Act of 1985 (LLRWPAAs) severely limit the scope of waste management options available to the states. For example, no comprehensive study of point of generation storage or disposal (including an evaluation of regulatory, technical, and economic concerns) has ever been implemented. Thus, the existing generator storage capacity and the ability of generators to expand storage capacity is unknown.

37. The economics associated with on-site storage/disposal versus centralized disposal has not been investigated. In evaluating the costs associated with on-site management, the economic situation would undoubtedly differ depending on the generator classification. For example, management requirements for medical and academic waste, virtually all of which is Class A, are far less stringent than those necessary for Class B and C utility waste. These differences would be reflected in costs incurred for facility development.

38. As already indicated, the majority of New York State's nuclear power plants have existing on-site storage capacity for a five (5) year period, and, from a regulatory perspective, extension of storage capacity beyond that limit would require an amendment to the reactor's operating license. The ability of the utilities to extend on-site capacity beyond the five (5) year limit requires objective investigation from the technical perspective.

39. Currently, HLRW, which is much higher in radioactivity than LLRW, is being stored at the reactor sites in pools or in monitored retrievable storage facilities. Given the absence of progress in developing a federal HLRW repository, it is likely that HLRW will remain on-site at the reactors for the next several decades. In fact, the NRC recently published a revision to its 1984 Waste Confidence Decision in which it evaluated the issue of safe storage or disposal of commercially generated radioactive waste. The NRC found that "spent fuel generated in any reactor can be stored safely and without significant environmental impact for at least thirty years beyond the licensed life (of the power plant) at the reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations." (1990 Annual Report Section of Public Utility Law, American Bar Association, p.93) The curie content of utility generated LLRW is negligible when compared with that of HLRW.

40. On-site storage, particularly for utility waste is a management alternative which deserves serious consideration in light of the questionable economics and technical aspects of the LLRW policy that is being forced upon the nation by the LLRWPA and LLRWPAA. There appear to be no significant technical limitations to extended on-site storage of LLRW at reactor sites.

41. At the 12th Annual DOE LLW Management Conference which I attended in Chicago on August 28 and 29, 1990, Mr. Terry Lash, formerly with the Illinois Department of Nuclear Safety, stated that all types of low-level waste can be stored safely at nuclear power plants if sufficient funds are allocated. The question, he stated, is not if it can be done but rather whether we want to go in that direction.

42. At the abovementioned DOE conference, Hans Tammemagi of Acres International reported that Ontario Hydro, Canada's largest nuclear utility, has been storing all of its LLRW on-site for the past 17 years, and on-site storage of LLRW is planned for a total of 50 years. Mr. Tammemagi stated that there have been no technical problems resulting from the almost 2 decades of on-site storage at the reactor complex, nor are any difficulties anticipated. Moreover, Mr. Tammemagi stated that on-site storage will need to be an integral part of any realistic LLRW management plan in the United States. He further recommended that the NRC recognize this need and alter its policy against long-term on-site storage at reactor sites after January 1, 1996.

#### SITE-SPECIFIC ENVIRONMENTAL CONSIDERATIONS

43. The 1980 LLRW Policy Act, although it encourages regional compacts, creates the climate for the proliferation of many disposal sites throughout the nation. Prior to enacting this legislation, a comprehensive review of region-specific



environmental considerations and an economic feasibility assessment were not implemented.

44. The literature supports the assertion that climate is the single most important factor in establishing technically sound LLRW disposal-sites. In a 1990 U.S. Geologic Survey (USGS) report (*Geohydrologic Aspects for Siting and Design of Low-Level Radioactive-Waste Disposal*, M.S. Badinger, USGS Circular 1034) it states:

Climate directly affects the hydrology of a site and probably is the most important single factor that affects the suitability of a site for shallow-land burial of low-level radioactive waste. Humid and subhumid regions are not well suited for shallow isolation of low-level radioactive waste in the saturated zone; arid regions with zero to small infiltration from precipitation, great depths to the water table, and long flow paths to natural discharge areas are naturally well suited to isolation of the waste. (emphasis omitted)

Thus, the LLRWPA and LLRWPA A have their most devastating effect and inflict the most hardship on those states located in areas of high precipitation, shallow water table depth, and high yield aquifers, such as in the northeast.

45. Water infiltration was the major factor which led to the closure of the disposal sites at Maxey-Flats, Kentucky and West Valley, New York. The wet climate and high water table of New York and other northeastern states clearly complicate construction of a disposal site. It is highly unlikely that a facility in the northeast could ever maintain its integrity and, thus, be as "safe" as one built in an arid climate. The degree of safety that could be achieved by a New York State facility may not be adequate to protect public health to the best of the nation's ability.

**FEDERAL AUTHORITY vs. STATE RESPONSIBILITY**

46. The federal government maintains complete jurisdiction over the majority of nuclear issues, including LLRW management. The definition of LLRW, certain performance standards, waste production and storage at nuclear power plants and Part 70 facilities, and allowable exposure standards are all federally controlled. Yet, the responsibility for LLRW management was delegated to the states. The NRC is attempting to "tie the hands" of the states that are functioning within the confines of the federal LLRW legislation and trying to meet its intent.

47. The NRC continually attempts to thwart the ability of a state to protect the health and welfare of its citizens and the integrity of its environment. As indicated above, the NRC has promulgated a policy against long-term on-site storage at reactor sites, regardless of the fact that this position is technically unsupported and that this management option has worked successfully in Canada.

48. In addition, the federal government is placing undue restrictions on the states through the NRC's proposed policy concerning exemptions from regulatory control. The NRC's recently issued policy statement is the first step toward the promulgation of regulations which will allow for certain wastes which are currently classified as LLRW to be disposed of in regular landfills, incinerators, and sewers. These "below regulatory concern" or BRC wastes account for approximately 50 percent of the dry active LLRW (or 30 percent of all LLRW).

49. There is disagreement within the NRC itself as to the appropriateness of the NRC's recommendations. The EPA has indicated that the proposed policy, if adopted into regulation, may not adequately protect public health and safety. Furthermore, the NRC intends to make its BRC standard a compati-



bility requirement for Agreement States; that is, the NRC will require all states to adopt these standards verbatim, thereby precluding a state from establishing stricter environmental controls. The NRC presents no substantive health or safety reasons for prohibiting Agreement States from exercising control over exemption standards.

50. The DOE has actively discouraged the use of many of its already contaminated lands as LLRW disposal sites, even though the LLRWPA in no way precludes this option.

51. Indeed, these examples, together with the NRC's policy against long-term on-site storage at reactor sites, clearly elucidate the degree to which the federal government is infringing on the ability of the states to effectively manage the waste, the damages from which they must assume full liability. The NRC and the DOE are following their traditional paths of promoting the nuclear power industry as specified in the Atomic Energy Act of 1954. These practices, particularly the NRC's prohibition on long-term on-site storage, may culminate in a public health and safety emergency in many states.

#### THE FEDERAL GOVERNMENT'S WASTE MANAGEMENT PRACTICES

52. The federal government responded to the challenge of developing a comprehensive national management plan for commercially generated LLRW by abdicating the responsibility of waste disposal to the states. This is ironic in light of the large number of DOE disposal sites throughout the nation which are in dire need of remediation. Past DOE nuclear operations have produced approximately 4,000 contaminated sites which require varying levels of remedial action (P. Whitfield et al., *The Department of Energy environmental restoration program: Meeting the challenges*, Proceedings of Waste Management 1990, Tuscon, Arizona).

53. As a specific example of the federal government's mismanagement of radioactive waste and deliberate attempts to shield itself from public scrutiny, consider the case of the Feed Materials Production Center in Fernald, Ohio. Records indicate that at this uranium reprocessing center of the federal government, the Atomic Energy Commission in 1953 stonewalled its contractor's attempt to remedy a water infiltration and overflow problem (bathtub effect) in the disposal trenches. Richard Shank, director of Ohio's environmental protection agency, estimated that 298,000 pounds of uranium waste has been released into the air from reprocessing plant operations. He estimated that 167,000 pounds of waste had been deliberately discharged into the Great Miami River over the 37 year operational period of the plant. An additional 12.7 million pounds of waste had been placed in pits, the integrity of which was uncertain.

54. The DOE has admitted that the government was aware of these practices and associated hazards all along, but it did not take action to remedy the situation. In fact, it took the federal government more than 30 years to admit that problems existed at Fernald. The gross mismanagement, which was ignored and exacerbated by government officials, is revealed in 300,000 pages of government memorandums, letters, and reports. In October 1989, a Cincinnati federal judge ordered the DOE to deliver \$73 million to area residents who had filed a class-action lawsuit. ("They Lied To Us," *Time*, October 31, 1988, pgs. 60-65; "Bomb makers' secrets," *U.S. News & World Report*, October 23, 1989, pg. 22)

55. Clearly, the federal government has not met its own responsibilities in effective LLRW management. It has, in fact, continually violated sound waste management practices, and this has resulted in the contamination of vast areas of the country. Undoubtedly, in an attempt to shield its many violations from the eyes of the public, it is in the federal govern-

ment's best interest to pass the responsibility for radioactive waste management on to the states.

#### TAKE TITLE PROVISION & POTENTIAL LIABILITY

56. In an unprecedented action, the 1985 LLRW Policy Amendments Act directs the states to take title to and assume full liability for damages resulting from LLRW produced within their respective borders in the event that in-state or in-compact management provisions are not made by January 1, 1996. No other waste generators, including those of the toxics and hazardous waste industries, are afforded this benefit. This provision creates the potential for tremendous liability on the part of the state.

57. In order to objectively evaluate the potential liability of a host area county or state with respect to radioactive waste management, it is necessary to investigate the costs associated with remediation programs which have occurred or which are in progress.

58. In the United States, there is not one example of a commercial LLRW disposal site which has completely maintained its integrity. Three of the existing disposal facilities closed within 10 to 15 years after beginning operations. The combination of operational practices, water infiltration, and seepage through two trench caps led to the closure of the West Valley, New York facility only 12 years after opening. The Maxey Flats, Kentucky site also experienced an ingress of water which led to migration of radionuclides from the burial ground. That site was closed 14 years after opening and has been designated as a "superfund" site. At Sheffield, Illinois radionuclide migration offsite has also been observed. When it was first opened, both the USGS and the State of Illinois certified it as leakproof. The site closed 11 years after open-

ing, and area residents are currently involved in remediation hearings.

59. In each instance, as is also the case at the three operating disposal sites, the disposal technology employed was shallow land burial; this is basically an adaptation of sanitary landfill practices. Although still allowable under NRC regulations, shallow land burial is prohibited by law in a number of states and compacts, including New York State. A number of disposal technologies involving engineered barriers are being considered, including concrete vaults and shallow mines. No operator in the U.S. has ever received a permit for any of these technologies.

60. According to the Kentucky Radiation Control Branch, Kentucky Division of Waste Management, since 1977 Kentucky taxpayers have spent \$10 million to keep radioactivity from spreading from the Maxey Flats commercial LLRW disposal site. Maxey Flats has been designated a federal "superfund" cleanup site, and Kentucky officials believe that costs to prevent future leaks may be \$40 to \$60 million.

61. In Illinois, two years after closing, the Sheffield, Illinois LLRW disposal site was found to be leaking tritium. U.S. Ecology (then, Nuclear Engineering, Inc.) had abandoned the site in 1978. In 1978 the Illinois Department of Nuclear Safety (IDNS) sued U.S. Ecology for \$98 million; the \$98 represented IDNS's cost approximation in 1978 dollars for exhuming the entire LLRW site and shipping it to Richland, Washington. After 10 years of litigation, IDNS and U.S. Ecology settled out of court, and U.S. Ecology's cleanup costs are expected to range from \$7 to \$9 million. (Information was obtained through a conversation with a representative of IDNS.)

62. At the West Valley, New York LLRW disposal site, Nuclear Fuel Services, the operator, left void spaces in the trenches, which allowed for collapse of the trench caps and the ingress of water. Since the water could not drain through the impermeable soils, the trenches overflowed, washing radio-nuclides into nearby streams. The site closed in 1975, only 12 years after beginning operations. ("Low-Level Radioactive Waste Disposal: How Are States Settling Their Sites?", Irvin White & John Spath, *Environment*, Vol. 26, No. 8, October 1984) Nuclear Fuel Services abandoned the site. According to the New York State Energy Research & Development Authority, New York has spent \$525,000 for pumping and maintenance of trenches. A site study is anticipated to be \$1 million, and full cleanup costs have not yet been determined.

63. In the 1991 budget, an increase of more than half a billion dollars over the 1990 budget was requested for DOE. This requested increase was due primarily for the purpose of remediating the 4,000 contaminated waste disposal sites of the DOE (H.A. Kurstedt, Jr., Programmatic issues affecting the implementation of the DOE five year plan, Proceedings from Waste Management 1990, Tuscon, Arizona). According to newspaper reports, the GAO has reported to Congress that the total cost of the federal cleanup will exceed \$150 billion.

64. A recently released Waste Tech News report states that cleanup costs at the Hanford reprocessing facility are estimated to run as high as \$50 million. DOE's cleanup plans must address approximately 5 billion cubic yards of waste material, 1000 inactive waste sites that have been consolidated into four proposed superfund sites, 55 hazardous waste treatment and storage sites, and about 200 square miles of contaminated groundwater. Cleanup plans include the immobilization of 2.5 million gallons of mixed LLRW.



**COSTS TO NEW YORK STATE  
& CORTLAND COUNTY**

65. According to Angelo Orazio, Chairman of the New York State LLRW Siting Commission, as of August 1989 the Siting Commission had expended \$11 million to perform its preliminary activities of candidate area selection. For the 1990-1991 fiscal year, the Siting Commission requested \$19.6 million. Part of these funds was for the initiation of site characterization activities. Jay Dunkleberger, Executive Director of the Siting Commission, estimates characterization activities will cost \$3 to \$12 million per site, and the Siting Commission expects that two or three sites will undergo detailed characterization. The New York State Department of Environmental Conservation has estimated the cost of facility development and maintenance at \$100 million (personal communication).

66. In December 1988, the NYS LLRW Siting Commission designated six townships in Cortland County as a "candidate area" for an LLRW disposal site. In September 1989, the Siting Commission selected two specific sites in the Cortland County Town of Taylor.

67. As a result of having been designated as a potential host community for an LLRW disposal facility, Cortland County has suffered significant financial harm.

68. Based on my conversations with numerous real estate agents in Cortland County, real estate sales in the sited Town of Taylor and in towns within close proximity to the sites have come to a virtual standstill. I have read newspaper reports which have stated that land values in the affected area have dropped by 30 to 50 percent. In instances where real estate transactions were in progress, upon discovering that the



county has two potential waste disposal sites, buyers have attempted to stop transactions.

69. I have received telephone calls from various residents within the affected areas who have stated that they were denied home equity loans because of the precarious position in which being designated as a potential host community has placed the county.

70. As a result of being designated as a potential site for an LLRW disposal facility, Cortland County has been forced to spend significant financial resources. Since February 1989 the county has expended approximately \$310,000 on special legal, technical, and political consultants. Projected costs for continuing our involvement are estimated at \$300,000 per year. This projected appropriation far exceeds Cortland County's 1990 budget allocations for a variety of programs, which include Juvenile Delinquent Care, Youth at Risk, Aid to Dependent Children, Alcohol Service Mental Health, Stop DWI, and the entire Planning Department budget. Costs are likely to be increased as the county's activities in litigation and special technical studies are heightened.

### SOCIAL & POLITICAL UNREST

71. On November 15, 1989, the NYS LLRW Siting Commission came to Cortland County for a public hearing. Approximately 4,000 to 5,000 residents, or 10% of the county's entire population, attended the hearing to voice their opposition. Attendees were required to go through a metal detector and 50 extra security officers had been brought in from 20 different State University of New York campuses to support the Cortland College squad.

72. Protesters from Cortland County have followed Governor Mario Cuomo around the country. Since the designation of potential sites in Taylor, Cortland County citizens' groups have protested the Governor in New York City, Rochester, Albany, Syracuse, Liverpool, Cortland, and Springfield, Massachusetts.

73. On November 2, 1989, Taylor officials threatened to close roads to block access to the Siting Commission and its staff. *See Exhibit B* (attached hereto).

74. A landowner in Cortland County who volunteered property to the Siting Commission has received threats and has requested police protection.

75. On December 13, 1989, protesters in Cortland County attempted to block the Siting Commission from access to the Taylor Central site. State officials were able to get on the sites, but, due to actions of the protesters, the officials' "walkover" had to be abandoned. Upon the state officials' attempt to move to another section of the site, opponents of the disposal site trapped state workers in their cars for about two and one-half hours. The county sheriff's department eventually escorted state workers from the site on foot. Seventeen of the sheriff's department's 25 patrol officers were present on this day to contend with the protests. Twenty protesters were arrested for disorderly conduct. *See Exhibit C* (attached hereto). The sheriff's department's protection of the Siting Commission has caused a great rift in the community.

76. In mid January 1990, Cortland County District Attorney Richard Shay sent a letter to Governor Cuomo in which he stated his intention to take "immediate steps to terminate all charges pending against those individuals arrested in Taylor on December 13, 1989." In a letter of response, John J. Poklemba, Director of Criminal Justice for New York State,

indicated that, in the opinion of the Special Review Committee, Mr. Shay had not carried out the responsibilities of his office.

77. On January 19, 1990, the Siting Commission again attempted to gain access to the sited areas in Cortland County. Protesters had established road blocks on all roads leading to the sites. The car of the approaching state workers was blocked in by a number of protesters, and state workers were kept from getting within five miles of either site. *See Exhibit D (attached hereto).*

78. In March 1990 the Siting Commission established a local information office in the Cortland County Town of Cincinnatus (which is a town adjacent to Taylor). Opponents resented and vehemently protested the presence of the Siting Commission and its staff in the community. On March 1, 1990, six protesters were arrested for blocking state officials' access to the office. On March 3, 1990, three more protesters were arrested. On March 8, 1990, six protesters were arrested. On March 15, 1990, the state hired a guard for the information office. On a number of occasions, animal carcasses were piled in the doorway of the office, making it nearly impossible for state workers to keep the office open. On April 12, 1990, the sheriff requested a weeklong "cooling off" period, and the office remained closed. In late April, after numerous requests from Cortland County government officials, citizens, and area state representatives, Governor Mario Cuomo directed the Siting Commission to close the office to avoid further conflict.

I, Cindy M. Monaco, do hereby swear that the facts stated in this Affidavit are true and correct to the best of my knowledge, information, and belief.

(Sworn to by Cindy M. Monaco, September 5, 1990.)

**Exhibit A—Letter.****AGREEMENT AND NON-AGREEMENT STATES  
COMPACT DISTRIBUTION****STORAGE OF LOW-LEVEL RADIOACTIVE WASTE  
(SP-90-80)**

In a letter dated February 16, 1990 (SP-90-27) we transmitted to you a copy of a Nuclear Regulatory Commission (NRC) Information Notice No. 90-09, "Extended Interim Storage of Low-Level Radioactive Waste by Fuel Cycle and Materials Licensees." This notice provided guidance to licensees planning to submit license amendment request for extended interim storage of waste. The notice stated that storage is not a substitute for disposal, and that waste should be stored only when disposal capacity is not available and for no longer than necessary. Also, the notice stated that license amendment requests should include final disposal plans which specify when and where waste will be shipped for disposal, and that storage authorizations will not normally be granted for more than five years. This notice is consistent with discouraging long-term storage beyond January 1, 1996.

Since this information notice was sent to you, the Commission in a memorandum dated February 14, 1990 informed the NRC staff that, "... the Commission will not look favorably upon long-term onsite storage of low-level waste beyond January 1, 1996." That date is the final deadline for development of low-level radioactive waste (LLW) disposal capacity. States, either acting alone or as part of a Regional Compact, which are unable to provide LLW disposal by that date must take title to, and possession of LLW generated in their States, as well as be liable for any direct or indirect damages for failing to do so promptly.

The purpose of this letter is to encourage Agreement States to adopt a similar view regarding storage of LLW beyond January 1, 1996, and to inform their licensees, as appropriate, of their policy on extended storage of LLW.

If you have a different view on extended LLW storage, we would be interested in your position. A written expression of your position on this matter would be appreciated. If you have any questions, please contact Ms. Cardelia Maupin at 301-492-0312.

VANDY L. MILLER,  
Assistant Director for State Agreements  
Program  
State Programs  
Office of governmental and Public  
Affairs

**Exhibit B—Newspaper Article.**

11/2/89

**TAYLOR OFFICIALS  
COULD CLOSE ROADS****By CONSTANCE M. NOGAS**

The Town of Taylor may have the power to legally close its roads and refuse to allow state Low-level Radioactive Waste Siting Commission workers to perform pre-characterization on two finalist sites for a radioactive waste dump in Taylor.

Pre-characterization is a series of tests such as drilling wells that will be done on five finalist sites for a dump, including the other three sites which are in Allegany County. The tests will determine which two sites should be selected for further studies.

Taylor Supervisor Robert Pudney has raised questions about whether the town could declare a state of emergency or somehow close the roads to the testers and their equipment. Pudney believes that the situation is developing into a confrontation between the people of state and Gov. Mario Cuomo. He wonders what would happen if the whole town board decided to resign and if Cuomo would then have to appoint a new town board.

Pudney told *The Cortland Standard* Tuesday that these were simply ideas he had, and he referred the legal questions to Thomas Meldrim, Taylor town attorney. Meldrim declined to comment on the issue.

Pudney's ideas turned out to be correct. If the entire town board resigned, Gov. Mario Cuomo would make interim appointments and then a special election would have to be held, Harry Willis, a senior attorney and local government counsel for the Department of State in Albany, said.

Article V Section 104 of Highway Law states that the county highway superintendent has the power to close a state highway in an emergency. There is nothing in this law that



prevents a town from closing the raid, said Pat Snyder, the attorney hired by the county to fight the dump issue.

This section of the law was amended to include a town highway superintendent closing a town road "if it shall appear necessary." It may be necessary in this case although this could be argued, Snyder said.

The town highway superintendent also has the right to sue the siting commission if the work was done wrong and somehow damaged the roads under Article VII, section 140 of Consolidated Law Service.

Pudney as supervisor may have the power to close the roads himself, if the town board passed a resolution asking him to do so. Section 276 of Town Law gives the town supervisor the power to do whatever the town board asks him to do, providing that it is legal.

11/2/89

### YOUR OPINION PROTEST QUILT PLANNED

To the Editor:

To Cortland County quilters and potential quilters:

Anyone interested in participating in the construction of a county-wide quilt, in protest of the proposed low-level radioactive waste dump, please contact me at (607) 863-3980 for details.

The more blocks made, the stronger our statement will be. The theme of the quilt will be positive, i.e., depicting the things we love about this county or earth, your lifestyle, people, special events, geography, etc.

If anyone has any extra cotton, poly-cotton fabric they can donate, it would be greatly appreciated.

Thank you,  
Mary Weber



**Exhibit C—Newspaper Article.****20 DUMP OPPONENTS ARRESTED****BY TRISH PROSPERO  
AND CONSTANCE M. NOGAS**

Despite the arrest of 20 people for civil disobedience, yesterday's demonstration in Taylor against the state's nuclear waste dump project was peaceful, the Cortland County Sheriff's Department reported.

Siting commission representatives wanted to tour property in the town proposed for the dump when members of Citizens Against Radioactive Dumping tried to stop them.

Commission representatives wanted to establish access routes for equipment that will be used to complete the preliminary suitability study of potential dump sites sometime next month.

When the state crew reached the bottom of the hill on Jordan Road shortly after noon, they were met by a group of about 20 protesters who tried to block them from leaving the road. Deputies moved them back and some shoving occurred during which time CARD's disobedience organizer, Tom Cummins, apparently touched either one of the deputies or one of the workers who had just walked down the hill.

"I feel I was arrested because I am chairman of civil disobedience and non-violent resistance group of CARD," he told a crowd gathered on Jordan Road near the second vehicle after he went back up the hill on Jordan Road.

At about 12:25 p.m., Undersheriff Lee Price spoke to the estimated 14 people who surrounded the other car on the top of the hill and on the property of Roland Elwood. Inside that vehicle were Jay Dunkleberger, siting commission executive director; Ted Adams, Cortland County's liaison with the siting commission; and John Thomas, a former aide to state Assem-

blyman Clarence Rappleyea, who now works for Weston, the firm hired to do the tests.

More protesters, approximately 50 in all, crowded around. Price told them they would be charged with disorderly conduct if they didn't move.

"We want these people to know that we don't want them here ever," Cummins said, "If anyone else would like to join me now in Taylor, you can be arrested now."

About 14 people accepted this invitation but the arrests were made peacefully with no one having to be dragged away from the car although they did sing "Jingle Bells" and "We Wish You A Merry Christmas." Everyone then walked down the hill where the siting commission representatives were safely driven away to an undisclosed location outside the county. When those arrested arrived at the bottom of the hill to receive an appearance ticket in a sheriff's van, they were greeted with cheers.

**Exhibit D—Newspaper Article.****N—DUMP OPPONENTS CLAIM TRIUMPH****BY CONNIE NOGAS**

TAYLOR—"The people's will shone strongly today," said Jean Weiss of Marathon, one of about 200 dump opponents from Cortland and surrounding counties who twice turned back a state team that came to here yesterday to examine access routes to one of Taylor's two finalist radioactive waste dump sites.

Anti-dump opponents who manned at least four highway checkpoints claimed victory after the three-man state team retreated without reaching its objective, but one member of the state team vowed they'd be back.

No protesters were arrested during the two separate blockades at two different intersections on Taylor Valley Road: the Cheningo-Solon Pond Road intersection and the Hawley Woods Road intersection.

The state team never reached its goal of inspecting the Taylor North Site on nearby Allen Hill Road to determine access for drilling rigs and to decide where soil and other tests would be conducted beginning in February. The first road-block stopped them about six miles away, the second about five miles away.

Most of the 730-acre site is owned by dairy farmer Arthur Allen who offered his land to the state for use as a dump. Allen wasn't available for comment late yesterday afternoon because he was reportedly milking his cows but he did speak to CARD members in the afternoon, said his wife, Sondra. She declined further comment on what was said.

About 15 anti-dump opponents, whose numbers later swelled to about 30, prevented a car carrying three siting commission representatives from entering the Cheningo-Solon Pond Road entrance for nearly an hour beginning at 9:15 a.m.

Inside the car were Ted Adams, the liaison between the New York State Low-level Radioactive Waste Siting Commission and Cortland County; Steve Choiniere of Dunn Geoscience of Albany, and Ben Tencer of Roy F. Weston Inc., the siting commission's main contractor.

At approximately noon, the trio again tried to reach the Allen farm by a different route but were met by about 30 slogan-shouting protesters near the intersection of Hawley Woods and Taylor Valley roads. Four Cortland County Sheriff Department officers were already at the scene and did not escort the car through the roadblock. More protesters and five more officers arrived later.

Dump opponents stopped the car by linking arms halfway around it in a semicircle while three protesters sat down in the road directly in front of the car. Eventually, over 100 people were milling around the car while other people stayed back to man other checkpoints.

"I felt that was my place," said Todd Rogers of Syracuse, a member of the environmental group Earth First, who sat down in front of the state men's car along with Citizens Against Radioactive Dumping members Gene Schepker of Cortland and David Pandori of Truxton. "That's what we're here for. We're here for the planet."

Ironically, yesterday was Rogers' birthday. What did he want for a present? "No dump!" he said.

Young and old were present from Taylor and other areas of the county as well as Broome, Onondaga, and Chenango Counties. Even a local political official linked arms with other protesters.

"I'll stand with the people," said Gerry Duffy of Cortland, the Republican chairman for the city. He said his involvement showed that the Republican Party really cares and is concerned about it the dump issue.

Protesters, many representing anti-dump groups other than CARD, occasionally shouted their opposition to the dump

coming to Taylor. And one protester, reportedly from Linklaen, rode his horse to the scene.

Meanwhile, the three state men spent the almost two-hour standoff inside the car by eating lunch from Wendy's and ignoring the shouts of protesters as Tencer also photographed the crowd from his vantage point in the back seat. They did speak briefly to the press, however.

"We expected the public opposition," Adams said. "Our interest is not to have anyone arrested at all. Our job is to progress forward."

Adams called the sheriff's department's handling of the day's activities, "very commendable" and promised to return but refused to specify what day.

At 12:35 p.m., four more sheriff's department officers arrived. Lt. Chauncey Bennett Jr. then told the crowd that if they didn't move, they would face charges of disorderly conduct for blocking traffic and obstructing a governmental agency because the siting commission is a state agency.

"We would like them arrested for harassment of the people and destruction of our lands," Weiss shouted back.

No one moved even after Bennett asked them to move a second time about five minutes later. Finally, protesters allowed the state men to turn their car around and leave about 1:45 p.m. Adams said the group was headed back to Cortland to assess what to do next but they never came back to Taylor again on Friday.

State officials say they have obtained the assess information they need for the Taylor Central site south of Allen's farm. Twenty dump opponents were arrested when state officials went to that site last month.

More than 30 anti-dump protesters were arrested earlier this week in Allegany County where the state has selected three other potential sites for a radioactive waste dump.

**Affidavit of Clarence D. Rappleyea, Jr. in Opposition to  
Motion to Dismiss Complaint (dated 9/5/90).**

CLARENCE D. RAPPLEYEA, JR., being duly sworn,  
deposes and says:

1. That I am the Assemblyman representing the 122nd Assembly District in the New York State Assembly, which district encompasses the County of Cortland, State of New York. My Assembly office is located in Room 933, Legislative Office Building, Empire State Plaza, Albany, New York 12248 and I also maintain a District Office at 17 Main Street, Cortland, New York 13045.

2. Additionally, I have been duly elected by the Republican Conference in the New York State Assembly to serve as the Minority Leader of the New York State Assembly and I have served in this position since 1983.

3. That I also am an Attorney, duly admitted to practice law in the State of New York and I conduct a law practice at Hinman, Howard and Katell, Esqs., 2 Hayes Street, Norwich, New York 13815, which office is located in the County of Chenango, State of New York.

4. That I make this affidavit in support of the instant action brought by the Plaintiffs seeking a declaratory judgment finding that the Low-Level Radioactive Waste Policy Amendments Act of 1985 is unconstitutional and, therefore, null and void.

5. As the Assemblyman representing Cortland County, one of the Plaintiffs herein, and as Minority Leader in the New York State Assembly, I submit this affidavit to offer affirmations and documents relevant to the enactment of Chapter 673 of the Laws of 1986 of the State of New York (Assembly Bill



11729/Senate Bill 9616) and, upon information and belief, to set forth my understanding of the legislative intent related to the adoption of such statute.

6. On July 3rd, 1986 the New York State Assembly and Senate during the final hours of the 1986 Legislative Session passed legislation referred to as Senate Bill 9616 (Assembly Bill 11729) regarding management of low-level radioactive waste generated in New York State. As evidenced by the Assembly roll call, a copy of which is attached hereto as Exhibit A and made a part hereof, the New York State Assembly voted 144-0 in favor of the adoption of this legislation at 1:22 p.m. on said date. Similarly, the New York State Senate also voted unanimously on July 3rd to adopt Senate Bill 9616 as indicated in the Senate roll call, a copy of which is annexed hereto as Exhibit B and made a part hereof.

7. Annexed hereto as Exhibit C is the two page transcript of the Assembly proceedings on July 3rd, 1986 for Senate bill 9616. The transcript reflects the proceedings of the New York State Assembly wherein this legislation was called for an immediate vote without any debate.

8. Upon information and belief, subsequent to passage by both Houses of the New York State Legislature, said bill was signed into law by Governor Cuomo and became Chapter 673 of the Laws of 1986 for the State of New York, a copy of which is annexed hereto as Exhibit D and made a part hereof. Your deponent respectfully refers to Section 2 of said Chapter 673 which clearly references the federal Low-Level Radioactive Waste Policy Act and the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 as the impetus for New York State to take immediate steps in connection with the selection of disposal methods for the siting, construction and operation of management facilities in New York State. Said legislative findings identify the January 1st, 1993 milestone,

as established by federal statute, as the principal foundation for the passage of this legislation.

9. Your deponent respectfully asserts that in the absence of such federal mandates, the New York State Assembly would not have acted during the 1986 Legislative Session to consider and pass New York's Low-Level Radioactive Waste Management Act (Chapter 673 of the Laws of 1986 for the State of New York).

10. In furtherance of my assertion that the New York State Legislature acted in response to federal dictates, annexed hereto as Exhibit E is a copy of the bill jacket for Chapter 673 of the Laws of 1986 for the State of New York. To the best of my knowledge as a Member of the Assembly, subsequent to the passage of legislation, the Governor's office circulates such legislation for comment by appropriate state agencies and other interested third parties to solicit and compile opinions regarding the adoption or veto of bills that have passed the Legislature. An extensive bill jacket was accumulated on Senate bill 9616 and each submission in said bill jacket emphasizes the federal requirements and milestones of the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985.

11. In support of Plaintiffs' Complaint, I further allege, upon information and belief, that the federal compulsion which led to the adoption of Chapter 673 of the Laws of 1986 in New York State has further imposed a disruptive impact on governmental processes at local and state levels. The siting process required by federal statute to be undertaken in New York State has had severe ramifications for the County of Cortland and the State of New York, in terms of both social and economic cost. Extensive public outcry, including public rallies and demonstrations, the formation of constituent groups opposing the siting process, instances of public reaction which

could be deemed civil disobedience, and all the attendant law enforcement problems and expenses related to maintaining public safety have been thrust upon the County of Cortland as it attempts to respond to its selection as a potential disposal site. Such public reaction is more fully described in the affidavit submitted on behalf of the County of Cortland but as its Assemblyman, I can attest to the prominence of this issue both for local and county officials, as well as state representatives.

12. Upon information and belief, the siting process has detrimentally affected the economic development of Cortland County in that land values have depreciated and the number of land transactions has declined. Potential businesses have questioned the feasibility of locating in the County, and the public has demanded further information regarding public health and safety in the event of the establishment of a low-level radioactive waste disposal facility within their locale. Although these concerns are more particularly addressed in the submissions from Cortland County, as a Member of the Assembly I have received approximately 3500 letters or mailings from my constituents voicing their opposition to the siting process and questioning the need for New York state to establish a disposal facility in light of the decreasing volume of low-level radioactive waste produced not only in New York State but nationwide.

13. Unquestionably the federal compulsion which caused New York to enact Chapter 673 of the Laws of 1986 has propelled Cortland County into a period of turbulent public reaction occasioning additional governmental costs, not only for law enforcement expenditures but to properly respond to the scientific and technical issues involved in the siting process. These political, social and economic burdens would not have been experienced in Cortland County but for the federal actions at issue in this proceeding.

WHEREFORE, your deponent respectfully requests that this Court deny the Defendants' motion to dismiss.

(Sworn to by Clarence D. Rappleyea, Jr., September 5, 1990.)

**United States Exhibit A—(included in the Compilation of  
Declarations and Exhibits filed on October 26, 1990)—  
Declaration of Stephen N. Solomon (dated 10/25/90).**

I, Stephen N. Salomon, do hereby declare that:

1. I am a Technical Analyst for the State, Local and Indian Relations Division of the Office of State Programs, Office of Governmental and Public Affairs, U.S. Nuclear Regulatory Commission. My Office is located at 11555 Rockville Pike, Rockville, Maryland 20852.

2. I have worked with the U.S. Nuclear Regulatory Commission (NRC) and its predecessor agency since August 1973. Since 1980 I have been primarily involved in low-level radioactive waste (LLRW) issues facing the States. My responsibilities include formulating NRC positions with regard to compact formation and the development of the Low-Level Radioactive Waste Policy Amendments Act of 1985. Other positions that I have held at NRC include Technology Assessment Specialist in the Cost-Benefit Analysis Branch, Environmental Economist for the Nuclear Energy Center Site Survey, Federal-State Siting Action Study, and State and local funding for emergency preparedness.

3. Low-level radioactive waste in New York State is generated by utilities and by "materials licensees." The utilities, which operate seven nuclear power plants, are regulated by NRC. New York State, because it is an Agreement State, regulates approximately 1,900 material licensees, many of whom generate LLRW. They are divided into four categories—academic, government, industrial and medical. In addition, within New York there are 75 NRC materials licensees, some of which engage in activities related to the production of nuclear power.

## AGREEMENT STATES PROGRAM

4. From NRC's perspective, the Agreement States Program is one attractive means of implementing the NRC's health and safety mission as it relates to radioactive materials and LLRW. The 29 Agreement States regulate approximately two-thirds of the users of radioactive materials in the United States and a large portion of the nation's LLRW activities. The program is funded and administered individually by the 29 Agreement States except for the NRC oversight function and the NRC training program for the States.

5. The Commission has recently reaffirmed its clear support for the Agreement State Program; and it believes that the programs are among the most efficient and effective means it has to protect the public health and safety in the materials area. The Commission strongly supports the continuation of funding for State Personnel to attend NRC training programs, with the Commission's resources, and with encouragement to the States to share costs where possible.

## TRANSPORTATION AND ENVIRONMENTAL REGULATION OF LLRW

6. The transportation of low-level radioactive waste is recognized as an important element of low-level radioactive waste disposal by all the interested Federal agencies and by the States. Because New York is an Agreement State, it must adopt regulations that are compatible with federal regulations which establish requirements for packaging, preparation for shipment, and transportation of radioactive material and apply to any person who transports radioactive material or delivers radioactive material to a carrier for transport. The State must also adopt the regulations of the U.S. Department of Transportation for interstate and intrastate transportation.



7. In the case of New York State, under Section 14(f) of the New York Transportation Law, 17 N.Y.C.R.R. 507, the Commissioner of Transportation is empowered to promulgate rules and regulations governing the classification, description, packaging, marking, labeling, and preparation of all hazardous materials in accordance with the regulations promulgated by the U.S. Department of Transportation in 49 CFR Parts 170-189. Many types of low level radioactive waste are included in the definition of hazardous materials.

8. The NRC has a history of cooperating with the State of New York in other areas of mutual interest. For example the NRC has cooperated with New York State in the area of environmental regulation of activities involving radioactive waste, by signing a memorandum of understanding (MOU). The MOU is between the New York State Board on Electric Generation Siting and the Environment, the Departments of Environmental Conservation and Public Service, and the NRC. It sets forth mutually agreeable principles of cooperation relating to environmental matters in areas subject to concurrent jurisdiction under State of New York and Federal laws and regulations governing approvals, licensing and regulation of nuclear electric generating facilities. The intent of the MOU is that the Siting Board, the two State agencies and the NRC regularly consult and cooperate in exploring and implementing appropriate procedures designed to assure that delays in the siting of electric generation facilities and duplication of effort will be minimized and that effective use will be made of resources of the two State agencies and the NRC, particularly in the areas of professional expertise.

#### TECHNICAL ASSISTANCE

9. The State Programs Office provides a central point of contact as NRC for the States and low level waste compacts on regulatory issues involving the management and disposal of

LLRW. Other NRC offices, such as the Division of Low-Level Waste and Decommissioning (within the Office of Nuclear Material Safety and Safeguards), and the Division of Engineering (within the Office of Nuclear Regulatory Research), provide additional technical assistance, as required. The Regional State Liaison Officers monitor State and compact actions in developing new disposal capacity and provide information and assistance as appropriate. Assistance is also provided to Agreement States or States seeking Agreement State status on staffing capabilities, program organization, analytical methods for predicting disposal site performance, environmental monitoring, and review and comment on the license review process and any difficult licensing questions. Several other federal agencies provide training as well. See "Funding the NRC Training Program for States," NUREG-1311, June 1988 and "State Cost Sharing of Training," NUREG-1336, August 1989.

10. The funding provided for Agreement State training is currently budgeted at \$695,000 annually. Of this amount, \$390,500 is associated with travel and per diem expenses of State personnel.

11. For low-level radioactive waste, the NRC has offered, for example, the following training courses during the last year for the States: LLRW Disposal Regulatory Workshop, September 7-8, 1989; LLRW Research Program, April 24-25, 1990; LLRW Disposal Regulatory Workshop, June 19-21, 1990; LLRW Performance Assessment Workshop, September 26-28, 1990; and Nuclear Transportation, September 24-28, 1990. Members of New York's Departments of Health, Conservation, or Labor attended each of these courses.

12. One training course involved participation in NRC's mock technical review of the prototype license application safety analysis report (PLASAR) prepared by the U.S. Depart-

ment of Energy for alternatives to shallow land burial—an earth-mounded concrete bunker and below-ground vault. The objectives of the review were: (1) to provide assistance to Agreement States and regional compacts by identifying acceptable and unacceptable alternative design features and concepts; and by demonstrating how to use the Standard Review Plan NUREG-1200, Rev.1, to conduct a licensing review; (2) to provide the NRC staff and State regulatory personnel with experience in using the Standard Review Plan to conduct a review of a LLRW facility; and (3) to identify weaknesses in the Standard Review Plan and licensing process that could lead to recommendations for improvements. (The Standard Review Plan provides guidance to NRC staff reviewers who perform safety reviews of applications to construct and operate LLRW disposal facilities.)

13. The NRC recently provided technical assistance to Utah, Texas, Nebraska, Michigan and New York in establishing their LLRW regulatory programs and in meeting the requirements of the Low-Level Radioactive Waste Policy Amendments of 1985. Technical assistance was also provided to Pennsylvania, Nebraska and New York in formulating LLRW regulations compatible with NRC regulations. Assistance on specific cases was furnished to Florida, Utah, Colorado, Georgia and Nevada.

14. During 1974, New York State and New York City participated in a joint DOT/NRC radioactive material transportation surveillance program. Many other State participated in this joint program between 1977 and 1981. This joint program laid the basis for the State Hazardous Materials Enforcement Development (SHMED) Program of the U.S. Department of Transportation, which provided guidance to states on regulation and enforcement of LLRW transportation.

15. States have taken a variety of approaches in order to comply with the 1985 Act, with respect to siting, building, operating and funding. Most states or compacts have chosen to have private contractors operate the disposal sites. The State of California has contracted with its "licensee designate", a private company, to site, design, apply for a license, construct and operate the disposal facility. The State itself will be involved only in licensing and regulating the facility.

16. States are considering a variety of disposal methods, including above- and below-ground vaults, earth-mounded concrete bunkers, below-ground canisters, and shallow land burial. New York is considering a number of alternatives, including deep vertical shaft mined disposal, and above ground monitored retrieval disposal.

17. The U.S. Department of Energy has funded transportation related studies designed to assist the States in deciding how to best regulate the transportation of low-level radioactive waste.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 25, 1990

STEPHEN N. SALOMON

B. *Garcia Applies Only When the Federal Government Attempts to Regulate Voluntary State Activity*

Both *National League of Cities* and *Garcia* involved challenges to the Fair Labor Standards Act ("FLSA"). The plaintiffs in those cases contested the application of FLSA's wage and hour provisions to employees of the states and their political subdivisions. The test developed in each case was thus designed to identify circumstances when the federal government could lawfully regulate employment practices of states and municipalities. Clearly, the specific holding of *Garcia* does not control the outcome of this case. See *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060-61 (5th Cir. 1987) ("Inasmuch as *Garcia* upheld the application of the Fair Labor Standards Act against a city entity as a valid execution of congressional power under the commerce clause, it may or may not be controlling in this case.").

More importantly, the general test adumbrated in *Garcia* does not apply in the circumstances described here. Both the Process Failure Test and *National League of Cities'* Traditional Function Test have consistently been applied only to statutes that regulate ongoing voluntary state activity.<sup>11</sup> LLRWPA does not regulate activities that the state has chosen to undertake; it commands the states to undertake certain operations against their will.<sup>12</sup> These unprecedented direct orders to enter and remain

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<sup>11</sup> See, e.g., *South Carolina v. Baker*, 485 U.S. 505 (1988) (issuance of state and local government bonds); *EEOC*, *supra* (state and local government employment); *FERC*, *supra* (public utility regulation).

<sup>12</sup> The federal respondents erroneously assert that Cortland County has failed to identify alternatives to LLRWPA's compulsory scheme that would have provided for LLRW disposal without imposing unavoidable responsibilities on the states. See Brief for the United States in Opposition (to petitions for a writ of certiorari) at 21 n.24. As is set forth clearly in Cortland County's petition, there are a variety of indisputably lawful alternatives available and well known to Congress. See Cortland County's Petition for a Writ of Certiorari at 17-27. At least two of these alternatives are consistent with the states' expressed preferences at the time that LLRWPA was enacted. First, Congress could have adopted the same system it has already employed for the

(Footnote continued)



in the LLRW disposal business remove LLRWPA from the scope of *Garcia*.

C. *Garcia Recognizes Affirmative Limits on Federal Power Independent of the Operations of the Political Process*

Even if the instant case were governed by the decision in *Garcia*, the reasoning of that case supports Cortland County's argument that the Process Failure Test is inapplicable here. In developing that test, the Court repeatedly characterized the political process as the *primary* defense of state sovereignty. See *Garcia*, 469 U.S. at 554 (stating that the "fundamental" limitation on the Commerce Clause is one of process); *id.* at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in . . . built-in [systemic] restraints . . ."). The admission that process serves as "the *principal* means chosen by the Framers to ensure the role of the States in the federal system" carries with it the recognition that the political process alone may not adequately protect state sovereignty. *Id.* at 550 (emphasis added). In exceptional situations, such as that presented by the enactment of LLRWPA, "affirmative limits" on federal action derived directly from the constitutional structure constrain congressional exercises of the commerce power. *Id.* at 556.

## POINT II

### CONGRESS EXCEEDED CONSTITUTIONAL LIMITS WHEN IT ENACTED LLRWPA

The facts of *Garcia* did not require this Court to "identify or define" the affirmative limits imposed by the constitutional structure. *Id.* One need look no further than this Court's recent

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regulation of nuclear materials, whereby the states may choose to regulate themselves or to have the federal government administer a regulatory program within their borders. See 42 U.S.C. § 2021(b). Alternatively, Congress could have implemented the NGA's funding recommendations, see J.A. 130a-31a, 133a (NGA Recommendations Nos. 8-9), by conditioning financial assistance upon compliance with federal requirements, see *South Dakota v. Dole*, 483 U.S. 203 (1987), instead of imposing the entire financial burden on the states, as it has done in LLRWPA.



Tenth Amendment decisions, however, to find a clear indication of the character of that constraint. As the following analysis shows, the one principle that has survived the vicissitudes of the modern law of federalism — namely, the rule prohibiting the commandeering of state machinery for federal purposes — defines the limit on congressional power under the Commerce Clause.

A. *This Court's Decisions Identify the Constitutional Constraint on Federal Power Left Undefined in Garcia*

The nature of the protection afforded to the states by constitutional principles of federalism has been the subject of intense dispute on this Court throughout the tenure of *National League of Cities* and *Garcia*. Dissenting, and even concurring, opinions record the jurisprudential debate about the appropriate test to be applied when adjudicating Tenth Amendment cases. See, e.g., *South Carolina v. Baker* ("S.C. v. Baker"), 485 U.S. 505, 530-34 (1988) (O'Connor, J., dissenting); *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *EEOC*, 460 U.S. at 244-51 (Stevens, J., concurring).

The application of a prevailing Tenth Amendment standard in specific cases has also generated considerable controversy on the Court. Members of the majority in *National League of Cities* repeatedly criticized decisions applying the Traditional Function Test as insufficiently sensitive to the limits of federal power. See *EEOC*, 460 U.S. at 251-65 (Burger, C.J., dissenting); *id.* at 265-75 (Powell, J., dissenting); *FERC*, 456 U.S. at 772-75 (Powell, J., concurring in part and dissenting in part).

Despite the dissension, however, this Court has consistently affirmed that principles of federalism impose some limit on the power of Congress. Indeed, one very specific constraint emerges from the Tenth Amendment cases discussed below. The *per se* rule tacitly recognized in those cases bars Congress from commandeering state governmental processes to serve federal goals.

### 1. *Hodel*

*Hodel* involved a challenge to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which established federal environmental protection performance standards for coal mining operations. SMCRA permitted states to establish their own regulatory programs to implement the federal standards and provided for direct federal enforcement of the standards in the absence of such programs. Citing a "wealth of precedent" attesting to congressional authority to preempt state laws governing private activity, the Court upheld SMCRA's program of "cooperative federalism" against Virginia's Tenth Amendment challenge. *Hodel*, 452 U.S. at 289-90.

The option SMCRA offered to the states of ceding responsibility for mining regulation to the federal government was key to this Court's decision in *Hodel*. Because the states could simply withdraw from the field, "the States [were] not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* at 288. Under such circumstances, the Court rejected the "suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program." *Id.* *Hodel* clearly implies that the statute would have unconstitutionally intruded upon the sovereignty of the states had it directly compelled such state action.

### 2. *FERC*

The federal requirements at issue in *FERC* were more intrusive than those in *Hodel*. In *FERC*, provisions of the Public Utilities Regulatory Policies Act ("PURPA") required state regulatory authorities to implement certain federal rules. *See FERC*, 456 U.S. at 759. PURPA also required that state utility commissions "consider," within certain deadlines, the adoption and implementation of specified ratemaking standards. *Id.*

The Supreme Court applied the doctrine of preemption in upholding the obligation to implement federal rules. A variation of the doctrine was also invoked to uphold the requirement that the state consider adoption of the specified standards. The

Court reasoned that because the federal government could have preempted all state regulation of utilities, it could adopt the less intrusive course of permitting the states to continue regulating on the condition that they merely consider the federal standards. *See id.* at 765.

Most significantly, the Court noted again that the states could avoid the intrusion effected by regulation under PURPA simply by ceasing the utility regulation governed by the statute. A state could avoid even the obligation to consider federal standards if it “simply stop[ped] regulating in the field.” *Id.* at 764. This Court thus distinguished that obligation from “a federal command to the States to promulgate and enforce laws and regulations.” *Id.* at 762; *see id.* at 764 (quoting *Hodel*, 452 U.S. at 288, in support of its conclusion that PURPA did not “commandeer” state governmental processes). The Court emphatically denied that its decision in *FERC* “authorize[d] the imposition of general affirmative obligations on the States.” *FERC*, 456 U.S. at 769 n.32.

The emphasis on the distinction between federal regulation of voluntary state activity and direct commands requiring the states to undertake action specified by Congress confirms that the majority in *FERC* regarded such commands as constitutionally suspect. Had PURPA prevented the states from ceding utility regulation to the federal government, the outcome in *FERC* might well have been different. The reasoning in *FERC* suggests that the majority would have agreed that a statute compelling the states to enter and remain in a particular area of activity unconstitutionally forces them “to function as bureaucratic puppets of the Federal Government.” *Id.* at 783 (O’Connor, J., concurring in the judgment in part and dissenting in part).

### 3. *South Carolina v. Baker*

Both *Hodel* and *FERC* were decided under the Traditional Function Test of *National League of Cities*. Even after that test was rejected and replaced in *Garcia*, however, this Court

continued to demonstrate concern that Congress refrain from "commandeering" state governmental processes. The opinion in *S.C. v. Baker* devotes a separate section to the claim that the statute at issue in that case impermissibly coerced state activity.<sup>13</sup>

*S.C. v. Baker* involved a challenge to section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), which removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were in registered form. TEFRA also imposed tax penalties on unregistered private corporate bonds. The plaintiffs argued that the statute unlawfully commandeered state legislative and administrative processes by effectively coercing states into enacting legislation authorizing bond registration and implementing the registration scheme.

The Supreme Court rejected this argument, stating: "That a state *wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *S.C. v. Baker*, 485 U.S. at 514-15 (emphasis added). Once again, the fact that the states could simply withdraw from the regulated field to avoid the imposition of federal requirements distinguished TEFRA from a statute that unconstitutionally commandeered state processes. The clear implication of the decision is that a statute that imposed obligations on the states and precluded them from withdrawing from the field would transgress Tenth Amendment limits.

B. *The Constraint Consistently Recognized by This Court Bars the Coercion Effected by LLRWPA*

As the foregoing analysis demonstrates, the constitutional principle barring federal commandeering of state governmental

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<sup>13</sup> The lengthy discussion of this claim suggests that the Court took it seriously, notwithstanding its ostensible uncertainty whether "the Tenth Amendment claim left open in *FERC* survives *Garcia*." *S.C. v. Baker*, 485 U.S. at 513.

processes transcends the competing theories of federalism manifest in recent Tenth Amendment jurisprudence.<sup>14</sup> Irrespective of the operative Tenth Amendment standard, this Court has consistently recognized that such commandeering offends affirmative constitutional limits on the power of Congress under the Commerce Clause. Moreover, the Court has repeatedly associated such commandeering with laws that preclude the states from ceasing activity they find burdensome because of federal requirements and ceding the field to the federal government.<sup>15</sup>

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<sup>14</sup> Even before the decision in *National League of Cities*, this approach was adopted by three circuit courts reviewing inspection and maintenance requirements imposed under the Clean Air Act. The Court of Appeals for the District of Columbia declared the requirements unconstitutional, reasoning that "the states . . . are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive." *District of Columbia v. Train*, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). Similarly, the Ninth Circuit stated:

[O]ur constitutional concerns [should not be] interpreted as disfavoring a determination by Congress that the states may regulate certain aspects of commerce . . . only in certain specified ways if a state chooses to regulate that aspect of commerce at all."

*Brown v. Environmental Protection Agency*, 521 F.2d 827, 840 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977); *see also Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). These cases are discussed in greater detail in Cortland County's petition for a writ of certiorari in this case.

<sup>15</sup> Lower federal courts have also followed this analysis. *See Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) (noting that the challenged statute, concerning maximum highway speed limits, only marginally altered the rules governing voluntary state activity), *cert. denied*, 493 U.S. 1070 (1990); *Delaware v. Cavazos*, 723 F. Supp. 234, 245 (D. Del. 1989) ("Delaware has failed to prove that it is being forced to participate in the [Guaranteed Student Loan ("GSL")] Program so that it has no choice but to be bound by all future amendments to the GSL Program. \*\*\* As such it follows that the 1987 Amendments do not violate the tenth amendment."), *aff'd mem.*, 919 F.2d 137 (3d Cir. 1990).



The instant challenge represents the first time that this Court has been asked to review the constitutionality of such a law. In enacting LLRWPA, Congress ignored the constitutional history described above, directly ordered the states to undertake LLRW disposal, and foreclosed the possibility of their withdrawal from the field. Under these circumstances, this Court should expressly affirm the simple rule it has tacitly recognized in its prior decisions and invalidate LLRWPA as an unconstitutional intrusion on the sovereignty of the states.

Affirmation of this rule is essential to preserve the advantages of the federalist system recognized by this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). The states cannot effectively serve as a check on federal power if Congress can simply dictate a mandatory agenda for the states and compel the states to use their revenues for federal purposes. States will also find it difficult to be "sensitive to the diverse needs of a heterogeneous society," *Gregory v. Ashcroft*, 111 S. Ct. at 2399, if state policy is dictated by the federal government rather than by the local electorate. Nor will states be able to serve as laboratories for experiment if their agencies are conscripted into the national bureaucratic army. *See id.*; *FERC*, 456 U.S. at 775. To preserve the "federalist structure of joint sovereigns," *Gregory v. Ashcroft*, 111 S. Ct. at 2399, this Court should declare that the states' right to avoid federally imposed "general affirmative obligations," where states choose to remain inactive, has been unlawfully violated by the enactment of LLRWPA.

### POINT III

#### **POLITICAL SAFEGUARDS FAILED TO PROTECT THE SOVEREIGNTY OF THE STATES WHEN CON- GRESS ENACTED LLRWPA**

Cortland County has argued that this case can, and should, be decided in its favor without applying *Garcia's* Process Failure Test. The reasoning of *Garcia* and other decisions of this Court amply supports the determination that LLRWPA violates affirmative constitutional limits on congressional power. If the



Court finds, however, that the Process Failure Test applies in this case, LLRWPA should nevertheless be found unconstitutional for the reasons set forth below.

A. *Garcia Should Not Be Understood to Write the Tenth Amendment out of the Constitution*

The crux of the decision to overturn *National League of Cities* rested in the *Garcia* majority's frustration with a test that required the Court to make substantive judgments about which governmental functions were "traditional" or "integral" to the operations of the states. See *Garcia*, 469 U.S. at 546-47. Nevertheless, in abandoning *National League of Cities* test, the Court confirmed that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.' " *Garcia*, 469 U.S. at 549 (quoting *EEOC*, 460 U.S. at 269 (Powell, J., dissenting)). The Court acknowledged "that the Constitution's federal structure imposes limitations on the Commerce Clause," *Garcia*, 469 U.S. at 547, but rejected its prior attempt to "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550. The Court sought instead to articulate a new, content-neutral "approach to defining limits on Congress' authority to regulate the States under the Commerce Clause." *Id.* at 547-48.

The *Garcia* Court thus did not abandon judicial review of Tenth Amendment questions. What the Court rejected was any attempt to resolve such questions by appeal to "freestanding conceptions of state sovereignty." *Id.* at 550. Judicial review of federal statutes remained essential for the protection of the "special and specific position in our constitutional system [occupied by the states]." *Id.* at 556.

In the lower federal courts, however, "the Tenth Amendment has become a 'dead letter' in constitutional law." *Smith v. Butterworth*, 678 F. Supp. 1552, 1557 (M.D. Fla. 1988) (quoting *Michigan v. Meese*, 666 F. Supp. 974, 977 (E.D. Mich. 1987), *aff'd*, 853 F.2d 395 (6th Cir.), *cert. denied*, 488 U.S. 980 (1988)), *rev'd on other grounds*, 866 F.2d 1318 (11th Cir. 1989), *aff'd*, 494 U.S. 624 (1990); see also *Bolin v. Cessna Aircraft Company*, 759

F. Supp. 692, 705 (D. Kan. 1991) (noting "the dormant state of tenth amendment jurisprudence"). Following the decision in *Garcia*, some courts have found it difficult to discern " 'what standard applies to issues' " of federalism and have evidently abandoned the effort to conduct Tenth Amendment analysis. *Butterworth*, 678 F. Supp. at 1557 (quoting *Meese*, 666 F. Supp. at 977). Others have simply concluded that the "Tenth Amendment is no more than a truism . . ." *Meese*, 666 F. Supp. at 980.

More often, courts have eroded the protection afforded by the Tenth Amendment by failing to develop a concept of the political process that admits genuine possibilities of failure. Such courts, including the courts below in this case, presume that the political system operates properly as long as representatives of the complaining state have not been "inappropriately *denied*" the opportunity to contribute input or otherwise participate" in the legislative process. *Nevada v. Burford*, 708 F. Supp. 289, 300 (D. Nev. 1989), *aff'd*, 918 F.2d 854 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2052 (1991). That assumption apparently led the District Court below to conclude that no defect in the political process could be found unless "somebody conspired to keep [a state's representatives] away from Congress." C.A. App. 368-69 (Transcript of Hearing, dated December 7, 1990).<sup>16</sup>

If the political process is conceived, however, so that nothing short of kidnapping a state's representatives to Congress constitutes evidence of malfunction, the Process Failure Test becomes a sham. That test can provide no constraint whatsoever on the actions of Congress if the notion of a political defect has no genuine application. In sum, *Garcia* may not be interpreted as

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<sup>16</sup> Cf. *Equal Employment Opportunity Commission v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) ("There is no suggestion that Congress surreptitiously enacted any legislation without notice to the State of Vermont."). The Second Circuit's view that the opportunity to participate in the legislative process suffices to defeat any Tenth Amendment claim is reaffirmed in the instant case. See *State of New York v. United States*, 942 F.2d 114, 119-20 (2d Cir. 1991) (relying exclusively on the legislative history of LLRWPA as evidence of the proper functioning of the political process), *cert. granted*, 60 U.S.L.W. 3294 (U.S. Jan. 10, 1992) (No. 91-543).

the courts below suggest if the test is to fulfill its intended purpose and the political process is to serve its protective function.

B. *Under a Proper Interpretation of Garcia, LLRWPA Must Be Found Unconstitutional*

In applying the Process Failure Test, lower federal courts have not appreciated the relevance of the factors that led this Court to uphold the statute challenged in *Garcia*. As is demonstrated below, those factors identify two conditions that promote the political accountability of Congress. Because the political accountability of Congress is essential to the proper functioning of our political system, the failure to satisfy those conditions — as is the case with LLRWPA — signals the type of process failure that warrants judicial intervention.

1. *Congressional Accountability Is Essential to the Protective Function of the Political Process*

For the political process to serve its protective function, Congress's accountability for actions that burden the states must be preserved. When Congress knows that it will answer directly to the electorate for burdens it imposes upon the states, a natural political check operates to curb unwarranted intrusion upon the autonomy of the states. When, on the other hand, the structure of a statute enables Congress to evade such responsibility, Congress "circumvents the political check on infringements of state sovereignty." *Texas v. United States* ("*Texas v. U.S.*"), 730 F.2d 339, 354 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984). Evidence that Congress has avoided political accountability in enacting invasive legislation indicates that the political process has failed and the law violates constitutional principles of federalism. See Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1180 (1977) ("[C]ongressional interference is *prima facie* unreasonable if conditions are such that Congress will (or may) not be held (sufficiently) accountable to the electorate for that action.").

a. *Congress's Political Accountability Is Preserved  
When a Statute Imposes Burdens Equally on  
Private Entities and the States*

In determining that the internal safeguards of the political process performed as intended in the factual setting of *Garcia*, this Court focused on two key factors. First, the statute reviewed in *Garcia* imposed burdens on private firms and the states alike. *See Garcia*, 469 U.S. at 554 (“[The plaintiff] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.”). When faced with the prospect of such legislation, states’ interests are aligned with those of private business. Congress thus becomes accountable not only to the states but to private industry for the burdens it imposes in enacting the law.

When a statute imposes burdens on the states alone, and lifts such burdens from private industry, the states are placed at odds with their natural political allies. In such circumstances, the states’ voice is likely to be far less effective in the national political process. The lobbying efforts of the states in defense of their sovereignty are likely to be overwhelmed by countervailing political (and economic) pressures exerted by national organizations of industries that stand to benefit from the intrusive legislation. *See Garcia*, 469 U.S. at 575 n.18 (Powell, J., dissenting) (noting “the rise of numerous special interest groups that engage in sophisticated lobbying and make substantial contributions to some Members of Congress”); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 16 (1988) (“Congressional representatives increasingly draw their support from nationally organized interest groups, rather than from state political organizations.”).

Representative democracy thus cannot be relied upon to protect the interests of the states when the states are deprived of their natural allies any more than it can be trusted to protect the interests of “discrete and insular minorities.” *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see S.C. v. Baker*, 485 U.S. at 513 (citing *Carolene Products* in concluding

that the political process had functioned properly because South Carolina had not alleged "that it was singled out in a way that left it politically isolated and powerless"). Recognizing the "possible failing" in the political process in cases involving individual rights, the courts strictly scrutinize statutes that involve suspect classifications. Similarly, the judiciary should view with suspicion statutes that single out states for special burdens.

b. *Political Accountability Is Preserved When Congress Bears the Costs of Administration*

In upholding the statute challenged in *Garcia*, the Court noted that "Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened in the area." *Garcia*, 469 U.S. at 555. That comment identifies the second factor that should be considered in applying the Process Failure Test. Where Congress successfully foists all or most of the financial burden of implementing a federal statute on the states, there is reason to believe that the political process may have failed to uphold constitutional principles of federalism. See Merritt, *supra*, at 17 (The "technique [of forcing state and local governments to administer national programs at state expense] permits Congress to escape fiscal accountability for its actions.").

The likelihood of process failure is greater still when a federal statute compels the states not merely to finance a regulatory program but to design, administer, and enforce it as well. "[T]he political accountability of Congress remains intact in the absence of direct congressional coercion of state action. If Congress enforces federal policy through its own agencies, the electorate will hold Congress responsible for that policy." *Texas v. U.S.*, 730 F.2d at 354-55. On the other hand, when Congress compels state and local governments to carry out unpopular federal policy, political censure is directed at those governments, while Congress avoids liability for the burdens it imposes. See *id.* at 354; Michelman, *supra*, at 1174.



Congressional compulsion of state legislatures, agencies, and courts not only "blurs the lines of political accountability," *FERC*, 456 U.S. at 787 (O'Connor, J., concurring in the judgment in part and dissenting in part), but enables Congress to achieve ends that "a majority of the national electorate affirmatively might well disapprove if it were required to bear the costs of implementing the national policy." La Pierre, *Political Accountability in the National Political Process – The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U.L. Rev. 577, 660 (1985). Requiring the states to serve as agents of national policy circumvents the political safeguards of federalism provided by obstacles to direct federal enforcement (such as diseconomies of scale and political opposition to the creation of massive federal enforcement bureaucracies). See Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1244 (1977).

In sum, when a statute compels the states alone to bear the financial, administrative, and political costs of implementing national policy, the statute reduces Congress's accountability to its constituency. The failure to impose substantial costs on the federal government should therefore be regarded as a good indication of a defect in the political process just as the imposition of such burdens confirms that the process is working. See *Garcia*, 469 U.S. at 555. When Congress neither provides substantial funding for the program it imposes nor permits the states to withdraw from the field in favor of direct federal regulation, a serious constitutional question is raised under the principles of federalism affirmed in *Garcia*.

## 2. Congress Avoided Political Accountability in Enacting LLRWPA

LLRWPA lacks both of the characteristics that tend to ensure Congress's accountability for actions adversely affecting the states. It singles out states for the special and onerous burdens of siting, funding, designing, constructing, maintaining, and regulating LLRW disposal facilities. Moreover, in enacting the Take Title Provision of LLRWPA, Congress severed the interests of the states from those of private LLRW generators by authorizing



those generators to transfer possession of their waste, or liability for it, to states that do not have disposal facilities by 1996.

In addition, by threatening punitive monetary sanctions, LLRWPA directly compels the states to enact new legislation, promulgate and implement new regulations, and judicially enforce new legal obligations. Compliance with these new requirements has not been supported financially by the federal government — unlike in *Garcia*, where the plaintiffs received over \$12 million of federal funding over two fiscal years. Nor has Congress assumed any obligations to administer or enforce the national LLRW disposal program, should the states prefer to withdraw from the field. Indeed, Congress has abdicated its responsibility entirely by transferring to the states the full obligation to dispose of LLRW, including all but a few categories of federally generated LLRW. See 42 U.S.C. § 2021c(a)(1)(B).

By compelling the states to undertake LLRW disposal, Congress is in fact escaping responsibility for the enactment of LLRWPA. As the record in this case demonstrates, Congress has successfully blurred the lines of political accountability by requiring the states to administer unpopular siting programs. Protest — some of it so large scale and disruptive as to require mass arrests — has been directed at state and local officials, see J.A. 67a-69a, 81a-82a, instead of at the members of Congress who mandated the involuntary activity. Because the state cannot lawfully refrain from its siting activities, despite political pressure to do so, citizens are left “feeling that their representatives are no longer responsive to their needs.” *FERC*, 456 U.S. at 787 (O’Connor, J., concurring in the judgment in part and dissenting in part).

The political checks that operate when regulation applies to states and private entities alike and when Congress bears the ultimate financial and administrative costs of its actions are therefore wholly absent in this case. The features of the political system that ordinarily ensure that Congress will respect the sovereignty of the states have been successfully evaded in the enactment of LLRWPA. Under these circumstances, LLRWPA should be found to fail the Process Failure Test for compliance with constitutional principles of federalism and should be declared unlawful and void.

## POINT IV

**THE "TAKE TITLE" PROVISION OF LLRWPA  
SHOULD BE FOUND UNCONSTITUTIONAL,  
EVEN IF LLRWPA'S DISPOSAL MANDATE IS  
UPHELD**

Cortland County maintains that all of LLRWPA's direct federal commands to the states violate constitutional principles of federalism. Nevertheless, the Take Title Provision, in particular, is so extreme and unprecedented a punitive measure,<sup>17</sup> that it warrants special attention from this Court.

The Take Title Provision threatens the states with immeasurable, and potentially enormous, liability. Congress has imposed this liability on the states despite the fact that they cannot control the production of the commercially generated LLRW and therefore cannot require the generators to adopt waste reduction measures that would limit potential costs to the states. Cortland County knows of no other statute in the history of this nation that attempts to impose such liability or to compel the transfer of dangerous waste to the states.

Contrary to the decision of the Second Circuit, *see State of New York v. United States*, 942 F.2d at 120-21, the cases cited in its opinion involving the contractual transfer of waste, *see General Electric Uranium Management Corp. v. United States Department of Energy*, 764 F.2d 896 (D.C. Cir. 1985); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F. Supp. 850 (N.D. Ill. 1990), provide no authority for the Take Title Provision. In *General Electric*, the Secretary of Energy was permitted, not compelled, to contract with private parties who sought to transfer nuclear waste to the Department of Energy;

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<sup>17</sup> See 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston) ("It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that."); 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Markey) ("I cannot recall any statute which has ever sought to impose such a liability on States. The statute may not pass a constitutional challenge . . .")

and the private parties, not the government, were fully responsible for the associated costs. *Commonwealth Edison* involved two private parties who voluntarily entered a contract providing for transfer of the waste. New York has never agreed to take possession of, or liability for, privately generated LLRW.<sup>18</sup> The Take Title Provision, unlike a contract, effects a forcible transfer against New York's will.

The extremity of the Take Title Provision has been recognized even by Congress's own legal advisers. Prior to passage of LLRWPA, the Congressional Research Service found that the provision raised questions under the Tenth Amendment. *See* 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Markey). The federal respondents in fact concede that "this provision, if actually triggered in a particular instance in the future, might raise further federalism concerns."<sup>19</sup> *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 25. For these reasons, as well as those articulated in Points I-III of this brief, the Take Title Provision provides the clearest basis for declaring LLRWPA unconstitutional.

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<sup>18</sup> The alleged "exchange" repeatedly invoked by the federal respondents, *see* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 3, 10, 16, 18, whereby Congress assigned disposal responsibility to the states in return for the right, as a member of a compact, to exclude LLRW generated outside the compact region, has no bearing on this case. New York is not a member of a compact and has not surrendered any element of its sovereignty in exchange for exclusionary rights.

<sup>19</sup> The federal respondents hint, without actually claiming, that the constitutionality of the Take Title Provision is not ripe for review at this time. *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 19 n. 23, 25. Cortland County respectfully suggests that New York should not be forced to wait until it is sued for damages under LLRWPA before raising the instant claim. In any event, the respondents at best raise a question of fact that cannot be settled on the present record. If this Court is seriously troubled by the issue of ripeness, which it should not be, the case should be remanded for a hearing on the relevant factual questions.

## CONCLUSION

For the reasons set forth above, Cortland County respectfully requests that the decisions of the courts below be reversed and that LLRWPA be declared unconstitutional and void.

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Respectfully submitted,

MICHAEL B. GERRARD\*  
DEBORAH GOLDBERG  
BERLE, KASS & CASE  
45 Rockefeller Plaza  
New York, New York 10111  
(212) 765-1800

PATRICK M. SNYDER, P.E., ESQ.  
1 North Main Street, Room 407  
Cortland, New York 13045  
(607) 753-8050

*Attorneys for Petitioner  
Cortland County*

*\*Counsel of Record*